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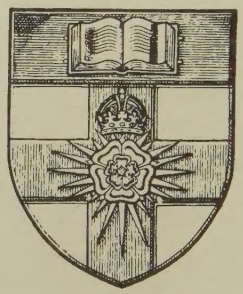

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THE

CRIMINAL APPEAL REPORTS.

WITH

SUBJECT INDEX, TABLES OF CASES AND STATUTES CITED.

JULY 2, 1922, TO DECEMBER 21, 1923.

EDITED BY

HERMAN COHEN,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

VOL. XVII.

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BEFORE

MR. JUSTICE DARLING, MR. JUSTICE SANKEY AND MR. JUSTICE BRANSON.

GEORGE HENRY COURTNEY.

1922
24 *July.*

The venue must always be stated in an indictment.

Applicant, who was not present, was convicted on 27th June, 1922, at the Glamorganshire (Cardiff) Quarter Sessions, of obtaining by false pretences, and was sentenced by the Chairman to twelve months' imprisonment with hard labour.

The Court, in dismissing the application for leave to appeal against conviction and sentence, called attention to the fact that the indictment disclosed no venue, in contravention of Schedule I., Rule II., of the Indictments Act (see s. 1), where a form is provided. This should always be observed.

Application dismissed.

H. C.

WILLIAM EDWARD SIMPKINS.

Grounds of appeal should be stated in the notice of appeal and not in written statements addressed to the Court.

Applicant, who was not present, was convicted on June 26th, 1922, at the Hertfordshire (Hertford) Sessions, of assault with intent to ravish, and was sentenced by the Chairman to eighteen months' imprisonment with hard labour, asked for leave to appeal against conviction and sentence.

The Ccurt, in dismissing the application, pointed out that the

1922
24 *July.*

WILLIAM EDWARD SIMPKINS.

Darling J.
Sankey J.
Branson J.

growing practice of appellants' sending in lengthy statements to the Court merely in repetition of the grounds set out in their notice of appeal was troublesome, and might easily lead, owing to the delay thereby caused, to their detention being increased by a week.

Application dismissed.

H. C.

GERALD AUGUSTUS NICHOLSON.

Leave to appeal against sentence granted by the Court, proprio motu.

Applicant, who was not present, was sentenced on June 29th, 1922, at the Essex Sessions, by the Chairman, to three years' penal servitude for larceny from the person; he asked for leave to appeal against conviction.

This the Court refused, but gave him leave to appeal against sentence. See p. 11.

Leave granted.

H. C.

HARRY JAMES.

Applicant, who was not present, was convicted on June 27th, 1922, at Winchester Assizes, of larceny of a deed, forgery, and uttering, and of obtaining by false pretences, and was sentenced by Avory J to seven years' penal servitude; he asked for leave to appeal against sentence.

Leave was granted on the ground that the previous conviction charged in the indictment took place on November 10th, 1921, whereas the above offences were committed in April and May, 1921. See p. 10.

Leave to appeal granted.

H. C.

ERNEST WILDER AND HIRAM TOWNSLEY.

1922
24 *July.*

Darling J.
Sankey J.
Branson J.

There is no general rule that first offenders should not be flogged: Evans and Ireton, 15 *Cr. App. R.* 173, *explained.*

Applicants, who were not present, were convicted at the Winchester Assizes, on June 3rd, 1922, of robbery with violence and assaults, and were sentenced by Avory J., after a trial lasting a day and a half, to twelve months' imprisonment with hard labour and twenty strokes of "the cat." They asked for leave to appeal against conviction and sentence.

Blake Odgers, for the applicants, in dealing with the corporal punishment, cited the headnote of *Evans and Ireton,* 15 Cr. App. R. 173: 1921; first offenders, as these men were, ought not to be flogged.

DARLING J.: If the headnote means that I thought that first offenders should never be flogged, it is incorrect: I never thought so, and do not now. There may be cases in which it would be proper.

Applications dismissed.

H. C.

Solicitor for Applicant—*Bradley Trimmer,* Alton.

HARRY MARGULAS.

24 & 25 *July.*

Conviction quashed on the ground of the verdict being against the weight of the evidence.

Appellant was convicted, with one Sheffsky, who did not appeal, on June 23rd, 1922, after a three days' trial at the Central Criminal Court, of shop-breaking and stealing a motor car at Clapham, and was sentenced by the Common Serjeant to three years' penal servitude; one Holiday, who was tried with him, was acquitted. The appeal was against conviction.

1922
24 & 25 *July.*

HARRY MARGULAS.

Darling J.
Sankey J.
Branson J.

G. St. J. Macdonald, for appellant, who was present. The verdict was against the weight of evidence, and was partly obtained by counsel for the prosecution appealing to the racial and religious prejudices of the jury against the two Jewish defendants, who were convicted (whereas the non-Jewish one was acquitted), and against the majority of the witnesses for an *alibi* who were Jews. This Court expressed its disapproval of such a tone in *Nathan House*, 16 Cr. App. R. 49: 1921: c. q. No stolen property was found on any of the defendants. But what is more important is that practically the prosecution relied on the evidence of a constable, Hadley, who identified both Holiday and appellant as driving the car in question at such a rate that he endeavoured to stop it on account of its speed; he admitted that he only saw the men in that flash, yet Holiday was acquitted.

Moreover, within the last few days a man named Robb had been convicted for other offences at the Central Criminal Court, and sentenced to six years' penal servitude—a term which covered by his wish other charges, amongst which he had specifically confessed to this shop-breaking at Clapham.

Alexander Robb was then called by the Court, and asked whether he was willing to give evidence on oath. On his stating that he was, he was sworn, and was informed by the Court that he need not give any answer incriminating himself. He then gave a circumstantial account of the crime in question, implicating himself and others, and completely exonerating appellant. He was examined by *Macdonald* and cross-examined by *Roome* for the respondents, till the Court stated that it placed no reliance on witness's evidence, and called on counsel to deal with the rest of the case.

Roome thought that the weakness of appellant's *alibi* had led to his conviction. It was true that the identification of appellant and Holiday rested on exactly the same testimony, but the discrimination in the latter's favour was probably due to the fact that there were discrepancies among the Crown witnesses themselves in his regard. Holiday's *alibi* was stronger than that of appellant.

DARLING J.: One reason for totally disbelieving Robb is that

1922
24 & 25 *July.*

HARRY MARGULAS.

Darling J.

he admits asking his accomplice to commit perjury. But though appellant, who has been convicted for this kind of offence over and over again, and is a professional thief, is probably guilty of this offence, still the evidence against him cannot be considered sufficient, if that against Holiday, which was exactly of the same weight, was not, as the two men were admittedly sitting side by side on the car when it was seen in a glimpse. No complaint can be made of the summing-up.

Conviction quashed.

H. C.

Solicitor for the Appellant—*Bruce Searle.*

Solicitors for the Respondents—*Wontner & Sons.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE AVORY.

ARTHUR JAMES BURTON.

27 *July.*

A statement to a jury, that it is for them to decide "which side" they believe should be accompanied by a careful direction on the particular facts of the case.

Appellant was convicted, with one Stirk, on June 28th, 1922, at the Knutsford County Sessions, of warehouse-breaking at Macclesfield on 26th—27th May, 1922, and was sentenced by the learned Chairman to six months' imprisonment with hard labour. Stirk withdrew his plea of not guilty, and was sentenced to twelve months' imprisonment with hard labour.

R. Sutton for appellant (under s. 10 of the Criminal Appeal Act), who was present. The count for receiving was in effect withdrawn. The chief ground of appeal is that the real defence was either never put to the jury or contemptuously dismissed.

1922
27 *July*.

ARTHUR JAMES BURTON.

Hewart L.C.J.
Darling J.
Avory J.

It was true that appellant told an extraordinary story, but the best proof of his innocence was that the moment he was free from the compulsion of the two thieves, one of whom had held a revolver at his head, to drive his motor lorry with the stolen goods (of the value of £362) in it—someone had hired it from him quite regularly in answer to his advertisement—he went early in the morning to the police at Macclesfield and told them the whole story of the burglary the night before. He had been hired to transport a machine, and suspected nothing till he found he was not loaded with machinery, but scarves. Appellant denied all previous knowledge of Stirk. In this state of the facts the learned Chairman misdirected the jury by constantly reminding them that "it is for you to say which side you believe" without any direction on the *onus* and, above all, without a syllable about appellant's being the first, at the first possible moment, to give the necessary information. He even said of the defence, "You may think it all bunkum." (He was stopped by the Court.)

A. M. Latham for the Crown. The facts were quite compatible with a conspiracy between appellant, Stirk, and the third man who escaped. There was some evidence that appellant knew Stirk, and it may be that when he found in the early morning that the burglary at Macclesfield was known, he thought that he would save himself and "give away" his accomplices. He knew by then that his own motor, which was identifiable, had been seen in Macclesfield at 12.15 a.m.

The LORD CHIEF JUSTICE: Appellant's conduct was quite consistent with innocence, but there was not a syllable to that effect in the summing-up. Here you may believe every word for the prosecution and yet appellant may not be guilty. There is not a word about the *onus* on the prosecution, and none about appellant's voluntary visit to the police. No doubt it was a case of strong suspicion, but that made the case essentially one for a patient and careful summing-up.

Conviction quashed.

H. C.

WILLIAM CHATTAWAY AND ELLEN CHATTAWAY.

1922
27 *July.*

Hewart L.C.J.
Darling J.
Avory J.

There is a common law duty to take proper care of an adult sui juris *who is helpless and unable for any reason to withdraw himself from the dominion of those who have charge of him, and neglect in such a state of things may amount to manslaughter.*

"Helplessness" is a question of fact for the jury.

Appellants were convicted, at the Warwick Assizes, on July 11th, 1922, of the manslaughter of their daughter, and were each sentenced by McCardie J. to five years' penal servitude. They appealed against the conviction on a point of law, and asked leave to appeal against sentence.

Maurice Healy, for the appellants (under s. 10 of the Criminal Appeal Act), who were not present, stated the facts. The girl was 25 years old, and after she was *sui juris* had returned home to her parents' house, had gradually failed in health, and ultimately died; it could not be denied that this was due to neglect and semi-starvation: she only weighed 55 lbs. just before she died. But though she had a moral right to the care of her parents, she had, in the circumstances, no legal right, and it was on this point that the learned judge had misdirected the jury, for he had constantly assumed that the girl was "helpless" within the common law meaning, whereas that was just the fact which it was for the jury to find. He cited *Bubb,* 4 Cox C. C. 455: 1851; *Chandler,* D. & P. C. C. 453; 24 L. J. M. C. 709; 6 Cox C. C. 519: 1855; *Shepherd,* L. & C. 147; 31 L. J. M. C. 102; 9 Cox C. C. 123: 1862; *Instan,* 1893, 1 Q. B. 450; 62 L. J. M. C. 86; 17 Cox C. C. 602: C. C. R.; *Senior,* 1899, 1 Q. B. 283; 68 L. J. Q. B. 175; 63 J. P. 8; 79 L. T. 562; 19 Cox C. C. 219: C. C. R.

[AVORY J.: *Charlotte Smith,* 10 Cox C. C. 82: 1865: C. C. R.: c. q., is in your favour. *Chandler* and other cases led to a statute being passed.

The LORD CHIEF JUSTICE referred to *John and Mary Conde,* 10 Cox C. C. 547: 1867.]

1922
27 *July.*

WILLIAM CHATTAWAY AND ELLEN CHATTAWAY.

Hewart L.C.J.
Darling J.
Avory J.

Sir Norris Foster for the Crown. There is no definition of "helpless" anywhere. But the facts here are indisputable, and had the deceased been an infant the appellants would have been within the statute. They are clearly within the decisions in the cases cited.

The LORD CHIEF JUSTICE: It cannot be suggested that the learned judge did not assume in his summing-up that the deceased was "helpless," but this omission was more than made up by the overwhelming evidence that she was in fact helpless while in appellants' "custody, charge or care or control," within the decisions. Thus Blackburn J. in *Charlotte Smith* said: "In order to make him [the master] criminally responsible for neglecting to do so [supplying with food, &c.] it must appear that the master has got the servant so under his own control and dominion *as to be helpless* like a lunatic or infant, and consequently unable to take care of himself. Now, was there in this case sufficient evidence that the deceased stood in such a relation to the prisoner that although there were no bars, locks or bolts, she was so terrified by the prisoner that she was in effect so much restrained from withdrawing herself as if she had been so confined? If there had been such evidence, I think that it would support the conviction." In the present case there can be no doubt what the answer of the jury would have been if they had been expressly asked the question whether at the material times the deceased was as helpless as an infant under the appellants' control. The Court cannot interfere.

Appeal dismissed.

H. C.

CATHERINE HULLETT.

Where a very material witness whom the jury must (at least) have believed is proved to be mistaken on or to have falsified a material point, the Court will quash a conviction.

Appellant was convicted, at the County of London Sessions, on June 15th, 1922, of inflicting grievous bodily harm on one Mrs. Joyce, and sentence was postponed by the Deputy-Chairman till the next sittings. In the meanwhile an important witness, Alice

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Jones, a girl about 17 years old, had gone to the police and explained that her statement at the trial that she heard defendant say, at the time of the assault, "I have bitten off her finger," was due to a mistake. She appealed by leave against the conviction; sentence had been again postponed.

Witnesses who had been summoned to this Court were ordered to leave the Court.

Hinde, for the appellant, who was not in custody, called the detective to whom *Alice Jones* had made two written confessions that her evidence was false, but did not propose to call *Alice Jones*, as she was a witness for the prosecution.

The Court wished to hear her, whereupon

Huntly Jenkins, for the respondent, called her, and

Alice Jones, being sworn, was told by the Court that she need not incriminate herself of perjury. She stated that before the trial Mrs. Joyce had told her—and written it down—that defendant at the time of the altercation had said as stated above, and she (Alice Jones), believing that this was true and that she had to say so in Court, had said so accordingly. She had not meant to tell a lie and did not know she was doing so. She had been present at the altercation, but had not heard defendant use the words.

The LORD CHIEF JUSTICE: The appellant was a woman of good character, but the respondent was not. Besides her recantation to-day, Alice Jones had made two statements to the police withdrawing the damning part of her evidence. Hence she was an unsatisfactory witness, and as it could not be said that without her testimony the jury must have convicted—though no doubt they might—the conviction must be quashed.

Conviction quashed.

H. C.

Solicitors for Appellant—*Bullen, Debenham & Co.*

Solicitors for Respondent—*C. V. Young & Son.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING, AND MR. JUSTICE BRANSON.

HARRY JAMES.

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A clerical error in an indictment may be a ground for reducing sentence.

See p. 2.
Appellant was not present.

The LORD CHIEF JUSTICE: There was an administrative error in the indictment; what was alleged as a *previous* conviction was a subsequent conviction. As this error may have affected the sentence, and looking to appellant's age and record, we reduce the term to five years.

Sentence reduced.

H. C.

HERBERT GEORGE CLARKE.

Severity of sentence.

Appellant in person appealed against sentence by leave of the Court. He pleaded guilty, at the Middlesex Sessions, on July 1st, 1922, to stealing property of the value of one pound, and was sentenced by the Chairman to two years' imprisonment with hard labour.

The Court, though aware of his many previous convictions, in view of his age (twenty-one), and the fact that since his last conviction he had done good service in the army and had been discharged with a good character, reduced the term to six months.

Sentence reduced.

H. C.

GERALD AUGUSTUS NICHOLSON.

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Severity of sentence after a long period of honest life.

See p. 2.

Appellant in person.

The last previous conviction took place nine years ago. Since then appellant had done good work in the army and as a recruiter. A Y.M.C.A. official gave reason to believe that he had made an honest attempt to reform. The Court reduced the sentence to twelve months' imprisonment with hard labour.

Sentence reduced.

H. C.

SAMUEL MINTZ, WALTER ROBERTS, JOHN HARRIS.

Remanet *sentences must be served after the fresh term of penal servitude.*
The sentences of the Court may discriminate between co-defendants who have been previously condemned to penal servitude and those who have not.

Appellants were convicted, on June 30th, at the West Kent Sessions, of shop-breaking and stealing cloth at Beckenham to the value of £300 on June 15th—16th, 1922, and were each sentenced by the Chairman to five years' penal servitude. A taxi-driver was sentenced to three months' imprisonment with hard labour, and did not appeal; another defendant was acquitted. Roberts and Harris had *remanets* of 273 and 269 days respectively to serve, but Mintz had not been sentenced to penal servitude. All appellants were present.

G. St. J. Macdonald for Mintz. So far his severest sentence has been twelve months' imprisonment with hard labour. The policy of this Court has always been to make punishment progressive, and this sentence is very severe; he is 25 years of age.

The Lord Chief Justice: The Chairman clearly intended that the *remanets* of the two ex-convicts should be concurrent with the

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fresh sentences, but as that is administratively impossible, we give effect to his intention by reducing their term from five to four years. Mintz's sentence is reduced to eighteen months' imprisonment with hard labour.

Sentences reduced.

H. C.

Solicitor for one Appellant—*Bruce Searle.*

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3 *Aug.*

REGINALD DUNN.
JOSEPH O'SULLIVAN.

A judge has the right to refuse to allow a prisoner on his defence making a statement irrevelant to the issue or subversive of law.

Appeals against conviction on law.

Appellants were convicted at the Central Criminal Court, on 18th July, 1922, before Shearman J., of the murder of Field-Marshal Sir H. H. Wilson, and sentenced to death.

The grounds of appeal were:—

(1) That the learned judge was wrong in law in requiring that a statement which appellant Dunn proposed to make from the dock on behalf of himself and his co-defendant, and which had been committed to writing, should first be submitted to him.

(2) That the learned judge was wrong in law in refusing to allow that statement to be read after it had been submitted to him.

(3) That the learned judge was wrong in fact in telling the jury that that statement which appellant desired to read was an assertion of the right to kill, or was intended to be a political manifesto, or was anarchical propaganda.

(4) That the learned judge was wrong in law in refusing to allow a prisoner on trial for murder to state the provocation which he believed he had received.

(5) That the learned judge was wrong in law in deciding that the facts alleged did not constitute provocation, the decision on the facts being the sole prerogative of the jury.

(6) That as a result of the learned judge refusing to allow the appellant to state the provocation which he believed he had received, the jury had no material on which to consider the motives

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and state of mind of appellant, and whether the alleged provocation was such as would justify them in attaching to their verdict a recommendation to mercy.

(7) That the learned judge was wrong in law in refusing to return the manuscript of the statement, the document not being the property of the Court, and not being a document which could properly be impounded.

T. Artemus Jones, K.C. (with him *J. Macveagh*) for the appellants, who were not present. There was overwhelming evidence on which the jury could convict appellants. They claimed a right to read an unsworn statement, but the learned judge refused to allow it.

[The LORD CHIEF JUSTICE: Is it your contention that an accused has an absolute right to make any statement whatever ?]

I submit that the accused has an absolute right. He referred to Archbold's Criminal Pleading, Evidence and Practice, 25th ed. p. 196; 26th ed. p. 203, regarding statement to jury by defendant when defended by counsel. The Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36, s. 1 (h), preserves that right. It is infringing the liberty of the subject for the judge to prevent it, so long as accused confines himself to setting out the circumstances in which he did the act.

What is the source of the judge's authority to prevent a subject of the King from saying what he desires on his behalf ?

[DARLING J.: If someone is not to decide what a prisoner may or may not say, he may say whatever he pleases.]

I submit he may; there is no law which prevents him.

[BRANSON J.: If he might say anything, he might offer the jury £1,000 apiece.

The LORD CHIEF JUSTICE: You do not suggest that there is any difference between written and unwritten statements ?]

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[THE LORD CHIEF JUSTICE: Assume that accused was saying something manifestly grotesque, or preaching murder from the witness-box or dock, could he not be stopped ?]

Not if it was connected with the crime with which he was accused.

The learned judge held that it was political in character.

Appellants had a right to tell the jury what the circumstances were in which the murder took place, and I submit that this decision was without precedent and cannot be justified.

The Attorney-General (with him *Travers Humphreys* and *H. M. Giveen*) for the Crown, were not called upon.

THE LORD CHIEF JUSTICE: In this case the appellants were convicted of murder and now appeal against conviction. It was admitted, as it must have been admitted, that the evidence was not merely strong, but quite overwhelming; but it is said that the learned judge who presided at the trial acted wrongly in preventing certain portions of a written statement from being read to the jury on the grounds that they were improper and mischievous. It is to be observed that the learned counsel for the appellants states that the appellants did not expect or desire acquittal, and that is made clear otherwise. Yet it is contended that an accused person has a right to make any statement, however fantastic and mischievous, not for the purpose of obtaining an acquittal, but for some collateral purpose.

What happened at the trial was that at the close of the case for the prosecution counsel for the appellants said that Dunn desired to read a statement from the dock. The statement was handed to the learned judge to read, and he refused to allow appellants to read statements in praise of killing, and he adjourned the Court for counsel to consider the position. On the resumption of the trial counsel informed the learned judge that the appellants had withdrawn their instructions, and that he and his colleague no longer represented appellants.

I desire to draw attention to two remarks made by the learned judge during the discussion about the admission of the statement; he said: "If it had a bearing on his defence as being guilty or not guilty I think I would permit the indulgence"; and later on:

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"You understand, Mr. Jones, I am not going to prevent either prisoner making any statement whatever which is relevant to this case; relevant to the issue we have to try."

It is quite clear that what was and is contended for here is some right to make a statement absolutely irrelevant, and in the opinion of the learned judge one manifestly inconsistent with law. What was sought was a platform for the propagation through the press of the doctrine that a person is to be excused the killing of a man against whom he has a grievance. That was a doctrine not merely contrary to law, but subversive of the foundations of justice.

In these circumstances, in the opinion of this Court, the course taken by the learned judge was correct. The notion that the prisoner has an unqualified right to fix the limits of what he may say is one which it is impossible to admit.

Appeals dismissed.

J. N. F.

Solicitor for the Appellants—*J. H. MacDonnell.*

THOMAS HENRY ALLAWAY.

A book written by a witness cannot be put in as part of his examination-in-chief, but the witness may be cross-examined on its contents.

Appeal against conviction on law.

Appellant was convicted at the Winchester Assizes on 7th July, 1922, before Avory J., of the wilful murder of Irene Wilkins at Bournemouth, on 22nd December, 1921, and was sentenced to death.

Only one point is here dealt with.

Handwriting and mistakes in spelling formed a considerable part of the evidence.

A. C. Fox-Davies (with him *S. Daiches*) *inter alia.* I desire to call a Mrs. Greenall to give evidence now. She was called at Winchester, but was in a state of hysterics. I then asked that her examination might be postponed till the following morning, but she was then absent when called upon.

[The LORD CHIEF JUSTICE, after calling upon counsel to indicate

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the nature of her evidence: The Court is disposed to hear this witness as she was at the Court at the trial, but was ill. It must not be taken as a precedent.]

I also ask to call a Miss Russell, who on 30th April received from Burley, near Bournemouth, a telegram in answer to an advertisement for a situation. It contained a similar mis-spelling to one in the decoy telegrams. She then had an interview in a hotel in London with the supposed sender, a man, who suggested a trip to Paris, and not employment.

[The LORD CHIEF JUSTICE: The Court will not allow her to be called. We cannot see that the evidence would prove anything.]

Mrs. Greenall was then called, examined and cross-examined.

Fox-Davies: I called as an expert witness at the trial a schoolmaster who had written a book on common mistakes in spelling. I wished to put the book in in evidence, but the learned judge refused to admit it. I submit that I was entitled to put it in when the writer was in the witness-box.

T. W. Inskip, K.C. (and *E. Percival Clarke*) for the Crown were not called upon.

The LORD CHIEF JUSTICE said on this point, counsel has complained that he was not allowed to produce in evidence a book written nearly forty years ago, in 1887.

The proposition is that where a person is offered as a witness, counsel may put in a book written by that person as part of his evidence. The Court does not accept that view. Such evidence would only be evidence of the existence of the book, but not of the truth of its contents.

No doubt, after his examination in chief, it would have been open to the Crown to cross-examine him on what he had written in the book, and produce the book for that purpose.

Appeal dismissed.

J. N. F.

Solicitor for the Appellant—*A. J. Lawman,* Bournemouth.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE GREER AND MR. JUSTICE SWIFT.

PHILIP WISE.

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The grounds on which this Court grants bail considered.

Application for bail.

Appellant was convicted on July 14th, 1922, at the Manchester Assizes, before Swift J., of arson, and sentenced to three years' penal servitude.

B. W. Ginsburg for the appellant, who was not present. I am instructed to apply for bail. An application for leave to appeal was lodged on July 20th, and in the circumstances it is obvious that that application could not be heard to-day, as Mr. Justice Swift was the judge presiding at the trial.

[THE LORD CHIEF JUSTICE: There is nothing in the statute to prevent the learned judge from hearing the appeal.]

If he is allowed bail it would be of assistance in preparing his case for appeal.

The Crown was not represented.

THE LORD CHIEF JUSTICE: The appellant was convicted of arson and sentenced to three years' penal servitude. He has formulated an application for leave to appeal against conviction and sentence, which is not at present before the Court, and he now asks for bail.

In order to adjudicate on the question of bail it is useful to see if there is any prospect of success on appeal, or if it is a case where it would be of assistance for the preparing of a real case for appeal if the appellant were released.

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PHILIP WISE.

Hewart L.C.J.

There does not appear to be the faintest prospect of success on this appeal, and it is right that I should point out that if the application is persisted in there may be some time wasted. The persons assisting the appellant should be informed that in the opinion of this Court there is no likelihood of success on appeal.

Application dismissed.

J. N. F.

Solicitor for the Appellant—*W. H. Herbert* for *J. Rosenthal*, Manchester.

WILLIAM JAMES YELDHAM.
ELSIE FLORENCE YELDHAM.

An undefended prisoner should always be informed of his right to give evidence on oath or to make an unsworn statement to the Court, but a mere omission on the part of the judge to inform him of this right is not a ground for quashing a conviction. Saunders, 68 *L. J. Q. B.* 296; 1898, *C. C. R.*, *followed.*

Applications for leave to appeal against conviction.

Applicants were convicted at the Central Criminal Court on 18th July, 1922, before Shearman J., of the wilful murder of a man named Grimshaw, and were sentenced to death.

On 17th May the man Grimshaw went with the female prisoner to Epping Forest, whither the male prisoner (who was living with her) followed them, and attacked and fatally injured Grimshaw, who died the next day. The prisoners took Grimshaw's watch and also his purse containing some £15. Only one point raised on the appeal is reported.

A. B. Lucy for the male appellant (under s. 10 of the Criminal Appeal Act), who was present. The man admitted that he struck the deceased, but said that he attacked him because he was with the woman to whom he was engaged, and they were acting improperly. The prosecution's theory was that the woman, acting in concert with the man, had decoyed the deceased there in order to rob him. There was no evidence of such a plot, yet the learned

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judge emphasized that proposition in his summing up. The man says that he ran after the deceased and used the spanner in self-defence, which was the defence in his case.

[SWIFT J.: Supposing that there was no plot, how can the facts, as you state them, be anything but murder?

GREER J.: May I suggest an answer? If there was misdirection regarding the plot, which I cannot see that there was, the jury might not have convicted the male appellant.]

Serjeant A. M. Sullivan, K.C. (with him *A. B. Lucy*) for the female appellant, who was present. I submit that there was a strange miscarriage of justice. The woman was convicted without having an opportunity of making a defence. My learned friend with me represented the male appellant at the trial, and the woman was not represented. The learned judge said that he did not see why Mr. Lucy should not represent both prisoners, and he agreed to do so. In the course of the trial it appeared that the man's defence threw discredit on the woman, and the learned judge then withdrew her defence from Mr. Lucy, and said that he would, if necessary, ask some questions in cross-examination on her behalf, as she was unrepresented. She was then never given an opportunity of giving evidence or of making a statement. She was never told of her rights, though the learned judge commented that she had not verified her statement on oath—had said nothing.

[The LORD CHIEF JUSTICE: She had seen her husband (as he is now) give evidence.]

A person in humble circumstances would not know of her rights, or when they had to be exercised, and she ought to have been informed. Even if she had known, could she be expected to say to the learned judge, "What do you mean by summing up when I have not given evidence?"

[The LORD CHIEF JUSTICE: Are you urging the proposition that where a prisoner is not informed of his right, the omission invalidates the trial?]

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WILLIAM JAMES YELDHAM. ELSIE FLORENCE YELDHAM.

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Not necessarily.

[Have you looked at *Saunders*, 68 L. J. Q. B. 296; 63 J. P. 24: 1898; C. C. R.?]

That is reported on a point under the Crown Cases Act.

The whole case against her depended on whether she was acting in agreement with the man to assault Grimshaw. Her evidence was most material, and her relations with the deceased required investigation.

Percival Clarke (with him *Roland Oliver*) for the Crown, was only called upon on the point that the learned judge had not informed the woman of her rights. She had seen her husband give his evidence, and must have known of her right. In the notice of appeal she has many questions to answer, but she does not suggest that any injustice arose from her not having given evidence, nor does she, even now, desire to give evidence.

[The LORD CHIEF JUSTICE: Had she any legal assistance in drawing up her notice of appeal? It appears to be in her handwriting.

Lucy: No. She was assisted, I understand, by the prison chaplain.]

The learned judge put her defence to the jury in his summing up, and read to them her statement on arrest. I submit that the words of the learned judge were more valuable than any evidence given by her, on which, too, she would have been liable to cross-examination.

The LORD CHIEF JUSTICE, after stating the facts, continued: Now there can be no doubt upon the facts that there was not merely sufficient, but overwhelming material on which the jury might find both the appellants guilty of murder. It has been argued on behalf of the man that his conviction depends solely on proof of a plot between him and the woman. That statement does not bear

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examination. From the wounds inflicted and the weapon with which they were inflicted it is clear that the theory of self-defence could not avail. With regard to the woman, it was said that there was no evidence on which the jury might find that she was acting in concert with the man for the purpose of decoying and killing Grimshaw. It is not usual for such agreements to be made openly in the presence of witnesses. That which the accused have agreed must be inferred from what they do.

In the second place it has been argued that, in the events which happened, the woman's case was not put before the jury. The circumstances were peculiar. At the outset of the trial the man was represented by counsel, but not the woman. At an early stage the learned judge, whose knowledge of the case was derived from the depositions, suggested that that counsel should act for both, and counsel acquiesced. But there came a time when it appeared that the defence of the man attacked the woman, and that their interests were not identical, and the learned judge thereupon relieved counsel of his task of defending the woman, and himself undertook to put questions on her behalf.

It is said that as a result of this unusual procedure the woman had no opportunity of giving evidence or making a statement, as she was not in terms told by the learned judge that she could go into the box and give evidence, or make a statement from the dock.

It is clear that no such express information was given, but it must be borne in mind that before he was relieved of his task of defending her, counsel had said that he was going to call the male prisoner only; that she had seen her husband go into the witness-box and give evidence, and finally she had made a long and detailed statement to the police, which was read by the learned judge to the jury. There is no suggestion in her notice of appeal that she suffered in any way through not having given evidence, and her written statement on appeal reiterates without going beyond her former statement which was read to the jury.

There is no doubt that the satisfactory course is that a prisoner's attention should be pointedly directed to his right to give evidence or make a statement, and it is unfortunate that this course was not adopted in this case.

Having regard to the facts pointed out, the overwhelming nature of the evidence, and the clearness and fulness of the learned judge's

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summing up, we cannot find any reasons to interfere with these convictions.

Applications dismissed.

J. N. F.

Solicitor for the female Appellant—*J. C. L. Sharman.*

SAMUEL PEAKE.

In a trial for bigamy the onus *is on the prosecution to prove that defendant knew that his other spouse was alive "within the seven years last past."*

Appeal against conviction on law.

Appellant was convicted at the Swansea Assizes on 19th July, 1922, before Roche J., of bigamy, and sentenced to fifteen months' imprisonment.

Joshua Davies (with him *Kirkhouse Jenkins*) for the appellant, who was not present. There was no evidence given to show that appellant knew that his wife was alive; the fact that he had said that his wife was dead "six years ago," whereas in truth she was still alive, was no evidence that he knew that she was alive, and they had been absent from one another for eleven years. See 24 & 25 Vict. c. 100, s. 57.

[The LORD CHIEF JUSTICE: I think it might simplify matters if counsel for the Crown would show why appellant was not within that protection.]

W. C. Howe for the Crown. Evidence was given that appellant said that his wife "had been dead six years ago." That showed knowledge of her being alive within seven years then last past. If he is seeking to assume his wife's death he ought to make enquiries. See *Tolson*, 23 Q. B. D. 168; 58 L. J. (M. C.) 97; 16 Cox, C. C. 629: 1889; C. L. R.

[The LORD CHIEF JUSTICE: But the proviso to the statute does not say so.

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GREER J.: That is where there has not been absence.]

[*Davies:* May I call your Lordships' attention to *Lund*, 16 Cr. App. R. 31: 1921 ?]

The appellant's defence was twofold. He alleged absence for seven years then last past, and also pleaded his wife's death. The prosecution was unable and did not disprove the former, but having pleaded the latter the appellant was not discharged from making reasonable enquiry to show the *bonâ fide* nature of his belief. If, in these circumstances, the *onus* of proving that the appellant knew of his wife being alive fell on the prosecution, then there was no evidence except what the appellant himself said, namely: "I knew she had been dead six years ago."

The LORD CHIEF JUSTICE: The question, and the only question, which arises here depends on the second proviso to s. 57 of the Offences Against the Person Act, 1861, 24 & 25 Vict. c. 100. That proviso says, referring to the offence of marrying again during the lifetime of a husband or wife: "Provided that nothing in this section contained shall apply to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time."

In the present case appellant was married in November, 1886, to a widow with five children, and lived at Newport. In 1901 she went to London, and he used to visit her there. In 1910 he ceased to visit his wife in London, and on 24th January, 1921, he married again at Bridgend registry office, describing himself as a widower.

No evidence was offered on the part of the Crown to negative the proposition that appellant and his first wife had been absent from one another for seven years last past. It was common ground that they had been absent eleven years. In those circumstances the question arose whether Mrs. Peake was known by appellant to be alive. The law is well settled. It is for the prosecution to prove that the appellant knew his wife was alive within the seven years. There are many authorities, and the proposition was re-affirmed by this Court in *Lund*, 16 Cr. App. R. 31: 1921; the Lord Chief Justice there said: "The *onus* of proving knowledge on

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the part of the defendant that his wife was living rests on the prosecution," and further on, "The prosecution must shew knowledge —inference is not knowledge."

It is apparent that in this trial some confusion arose between the case in which the proviso applies and that which is required, where, although the term of seven years is not satisfied, defendant relies on the fact that he believed his wife to be dead. That second question did not arise here. The question is, did the prosecution prove that the appellant knew his wife to be living within the seven years last past? It is conceded very frankly by counsel for the Crown that this *onus* was not discharged.

The allegation that the appellant knew his wife was living within seven years last past was a material part of the case for the prosecution, and there was really no evidence upon it to go to the jury.

Conviction quashed.

J. N. F.

Solicitor for the Appellant—*H. G. Rastall,* Agent for *Daniel Perkins,* Aberavon.

ELIZABETH EADIE.

Leave to appeal granted in a primâ facie *case.*

Application for leave to appeal against conviction and sentence. An appeal against conviction on law was placed in the summary list.

Appellant was convicted at the Central Criminal Court, on 21st July, 1922, before Shearman J., of the possession of explosive substances, and sentenced on 24th July to two years' imprisonment.

J. David Casswell for the appellant, who was not present.

Appellant had, since 1916, been residing at a flat in Bayswater. After the murder of Field-Marshal Sir H. H. Wilson, on 22nd

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June, it was raided by the police, who were admitted by a Miss Burrows, to whom appellant had sub-let one of the rooms in the flat some two months earlier. In the room occupied by Miss Burrows was found a box, in which were discovered eleven tubes of thermite, which is highly inflammable, and which were incendiary bombs. The defence was that they had been left behind by a Miss Manning, who had occupied the room before Miss Burrows, and who had left about October, 1921. There was also in the room a box belonging to Miss Manning and some books. The bombs were taken away and examined; newspapers dated July, 1921, and January, 1922, were found at the bottom of the box and wrapped round one of the bombs, but this was discovered after the bombs had been returned after examination. No evidence of these dates was given till the trial, though notice of other new evidence was served. The learned judge did not deal with the question of possession. The room in which the box was found was in the occupation of Miss Burrows. I would call attention to *Holmes and Gregory*, 11 Cr. App. R. 130: 1915, c. q.

[The LORD CHIEF JUSTICE: What does the Crown say on this point of possession ?]

Vernon Gattie for the Crown. The evidence was that these bombs were there when Miss Burrows arrived, according to the appellant herself. I submit that the letting of the room did not change the possession. Could a receiver of stolen goods who lets a room to a tenant divest himself of the possession of any stolen property in that room and put it on the tenant ?

The LORD CHIEF JUSTICE: Whatever may be the merits of this case, there appears to be a point to be argued.

Leave to appeal granted.

J. N. F.

Solicitor for the Appellant—*J. H. MacDonnell.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SANKEY.

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ELIZABETH EADIE.

Properly found in a room let may nevertheless be in the possession of the lessor.

See p. 24.

J. David Casswell for the appellant, who was not present. To support this conviction there are three ingredients, (1) possession or control, (2) knowledge, (3) intent. The learned judge took the line that she had possession, and he treated knowledge and intent as the same thing. I submit that appellant had not possession.

[The LORD CHIEF JUSTICE: Is it not a question of fact in this case whether there was possession or not?]

The learned judge failed to direct the jury at all on the question of possession, or on the test to be applied on that question.

Counsel cited *Annie Lewis*, 4 Cr. App. R. 96: 1910: c. q.; *Edward Berger*, 84 L. J. K. B. 541; 31 T. L. R. 159; 11 Cox, C. C. 72; 11 Cr. App. R. 72: 1915: c. q.; *Holmes and Gregory*, 11 Cr. App. R. 130 (above).

H. D. Roome, for the Crown, was called on only on the question of possession. The jury were clearly directed by the learned judge that they must not convict unless they considered appellant was in possession of the box and knew its contents. He referred to *Savage*, 70 J. P. 36: 1906.

The LORD CHIEF JUSTICE: The appellant was convicted at the Central Criminal Court on an indictment which contained three counts. The first count charged her with keeping explosives with

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intent to endanger life or property contrary to s. 3 (b) of the Explosive Substances Act, 1883, 46 & 47 Vict. c. 3, the second count with possessing explosives under suspicious circumstances contrary to s. 4 of that Act, and the third count with possessing explosive substances for the purpose of committing felony contrary to s. 54 of the Malicious Damage Act, 1861, 24 & 25 Vict. c. 97. She was convicted on all three counts. . . . There was ample evidence to show that the appellant was guilty not only under the Act of 1861, but also under the Act of 1883, and with regard to the summing up, if it can be criticised, the only criticism might be that it took an unduly lenient view of the matter, and dealt with the case as if the charge were solely under the Act of 1861.

In the course of the argument which has been put forward to-day on behalf of the appellant the suggestion was thrown out—guardedly at first, but at last openly—in order to deal with the awkward dates on the newspapers at the bottom of the box and round one of the bombs, that someone, in order to strengthen the case for the prosecution, had placed those newspapers there after the box had come into the possession of the police. That is a grave suggestion, but one which has in fact no more substantial basis than imagination.

It has been argued that upon the facts there was not sufficient evidence to show that appellant had these bombs in her possession. It was said that they belonged to a Miss Manning; there was no evidence to show that Miss Manning had been asked to take them away, and from the facts as a whole the jury might well find that the appellant had possession of these bombs. There is no reason to interfere with the conviction.

With regard to the sentence, as I said before, the learned judge, taking a lenient view, dealt with the conviction under the Malicious Damage Act, 1861, whereas under the Explosive Substances Act, 1883, the appellant might have been sentenced to fourteen years' penal servitude. There is no reason to interfere.

Appeal dismissed.

J. N. F.

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ALFRED ABRAHAM SHEFSKY.

Conviction quashed on the ground that the evidence was not sufficient to support it.

Appeal against conviction.

Appellant was convicted at the Central Criminal Court, on 23rd June, 1922, before the learned Common Sergeant, of shop-breaking, and sentenced to six months' imprisonment with hard labour. He was on bail.

On 27th March, 1922, the window of a jeweller's shop in Clapham Road was broken, and jewellery stolen by a gang of men who drove off in a motor car. Several men were arrested on the following day at a public-house in Shoreditch, and on March 30th four men, Holiday, Margulas, appellant and Cohen were charged with the offence. None of the missing jewellery was traced to the accused, and the only evidence was that of identification. A Mrs. Kellow, who was on the opposite side of the road at the time of the window being broken, identified Holiday, appellant and Cohen as being members of the party. Subsequently she said she was mistaken about Cohen, and he was discharged; at the trial the jury acquitted Holiday and convicted Margulas and Shefsky. Margulas subsequently appealed and his conviction was quashed (above, p. 3).

Walter Warren for the appellant, who was present. I submit this conviction is not satisfactory. The only evidence against the appellant was that of Mrs. Kellow. She said that once she had seen a face she never forgot it, yet she admitted that she was mistaken in the case of Cohen, and Holiday called witnesses to prove he could not have been there, and the jury disbelieved her evidence. There was no other evidence whatever against appellant.

I submit that these facts show that the woman's evidence is untrustworthy and insufficient to sustain the conviction.

Roome for the Crown.

The Lord Chief Justice: This appellant was convicted upon an indictment which charged him, along with two men named

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Margulas and Holiday, of shop-breaking. He has been granted an extension of time for leave to appeal and bail. The case of Margulas came before this Court some time ago, and it is to be observed that the appellant did not give notice of appeal until the appeal of Margulas had been heard and granted. The sole evidence against the appellant was that of a Mrs. Kellow, who said that he was the man who broke the window. He himself set up an *alibi*, saying that he was at home at the time the event occurred, and called witnesses to prove it, but the jury did not accept it.

The fact is made plain that there was only one witness against the appellant, and that was a witness to identification.

It does not in the least follow that because a person was wrong in one or two cases of identification she is wrong in the third case. Here, however, the woman was admittedly wrong in the case of Cohen, and was found by the jury to be wrong in the case of Holiday, and there was no other evidence at all against the appellant.

In these circumstances it appears to the Court that the evidence is insufficient, and the conviction unsafe and unsatisfactory. The evidence against this appellant is weaker than that against Margulas, whose appeal was allowed.

Conviction quashed.

J. N. F.

Solicitors for the Appellant—*Messrs. Palmer and Robinson.*

ALBERT ARTHUR NORMAN.

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Where a common law offence and a statutory offence are identical a commitment for the latter is a commitment for the former. The phrase "contrary to the statute, &c.," may mean "and also at common law."

Appeal against conviction, on a point of law.

The appellant was convicted at the London Sessions on 19th September. 1922, before the acting Deputy-Chairman, of keeping a brothel, and was sentenced to four months' imprisonment in the second division.

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Appellant was summoned at Bow Street under s. 13, sub-s. (1) of the Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 69, for keeping a brothel, an offence triable summarily under the Act.

By the appellant electing to go to trial by a jury it became an indictable offence.

The indictment which was presented to the Grand Jury contained two counts, one for the common law offence of keeping a brothel, and one for the offence under the statute (*a*). At the trial the count under the statute was not proceeded with, but appellant was tried and convicted on the count charging him with the common law offence.

A. S. Comyns Carr for the appellant, who was present. The appeal raises a point on the jurisdiction of the Court before which appellant was convicted. The point was not raised at the trial, but where the objection goes to the jurisdiction I submit it is never too late to raise it, and this Court can therefore consider it: *Thompson*, 1914, 2 K. B. 99; 83 L. J. K. B. 643; 78 J. P. 212; 30 T. L. R. 223; 110 L. T. R. 272; 24 Cox, C. C. 43; 9 Cr. App. R. 252. In this case, from the time of appellant's election to go for trial before a jury, it became an indictable offence: *Brown*, 1895, 1 Q. B. 119; 18 Cox, C. C. 81; 64 L. J. M. C. 1, C. C. R.; 72 L. T. R. 22.

The appellant was committed for trial for the statutory offence of keeping a brothel contrary to s. 13, sub-s. (1) of the Criminal Law Amendment Act, 1885, but by s. 17 of that Act, indictable offences thereunder are not triable at Quarter Sessions; the offence charged, both common law and statutory, is subject to the Vexatious Indictments Act, 1859, 22 & 23 Vict. c. 17, and as there was no committal for the common law offence, and none of the other steps laid down in sect. 1 of that statute were taken, there was no jurisdiction to entertain the matter or to present the bill to the Grand Jury. The result was that on the count preferred under the statute there was committal, but no jurisdiction, and on the count preferred under the common law there was jurisdiction, but no committal.

(*a*) "Any person who (1) keeps or manages or acts or assists in the management of a brothel . . . . shall on summary conviction . . . . be liable, &c."

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[The LORD CHIEF JUSTICE: I observe that the words of the committal are "did unlawfully keep a brothel contrary to the statute, &c." The word "&c." suggests a committal for the common law offence also.

AVORY J.: Sub-ss. (2) and (3) of s. 13 of the Act of 1885 constitute new offences, but sub-s. (1) simply deals with the common law offence.]

The point turns on the meaning of s. 1 of the Criminal Law Amendment Act, 1867, 30 & 31 Vict. c. 35; and I submit that there must be a good count to which one can add further counts, and that as here the original count was bad, not being triable at Quarter Sessions, the subsequent count must go also.

J. F. Eastwood for the respondents. Entirely apart from the word "&c." in the committal, and entirely apart from the statute, I submit that the original count was not a bad count. S. 17 of the Criminal Law Amendment Act, 1885, though it prevents a count founded on the statute from being tried at Quarter Sessions, does not prevent it being presented to the Grand Jury there, and if a true bill was found it could be sent to the Central Criminal Court for trial. The common law count is, therefore, not added to a bad count, but to a good count.

In regard to committal, the common law offence and the statutory offence are exactly the same, and the committal is for the statutory or the common law offence.

[The LORD CHIEF JUSTICE referred to *Allum*, 2 Cox, C. C. 62: 1846.]

Comyns Carr in reply.

AVORY J., after reciting the facts: When looked at it is clear that the indictment charged the appellant with the common law offence of keeping a brothel. The arguments of counsel for the appellant are fascinating, if not sound. His first point is that under the Vexatious Indictments Act, 1859, the appellant cannot be indicted unless committed for trial by a magistrate, and that as in this case the commitment was that the appellant did

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unlawfully keep a brothel contrary to the statute, &c., he can only be indicted for that statutory offence. If the statutory offence were a different offence to that at common law the point would need consideration, but when it is realised that it is one and the same offence, the point ceases to have any substance, quite apart from the meaning of the word "&c." in the commitment. In such circumstances, when a man is committed for trial then he is committed for the common law offence; the first count of the indictment was for that offence, and in the opinion of this Court it was founded on the committal for trial.

The second point, if it were necessary to decide it, might need consideration. Counsel for the appellant contended that Russell Gurney's Act, 1867, only applies in the case of adding a count to another good count in the indictment, and that here the original count was bad, as it was not triable at Quarter Sessions.

That count, however, was one on which the Grand Jury at Quarter Sessions could lawfully find a true bill, even though the offence could not be tried in that Court: *Allum* (above). Counsel in his argument further appears to have overlooked the difference between sub-s. (1) and sub-ss. (2) and (3) of s. 13 of the Act of 1885. The latter sub-sections create new offences, whereas the offence under the first sub-section is merely the common law offence, and the sub-section only makes it an offence also triable summarily. Even if there was not a committal for the common law offence, there was therefore no objection to adding the count.

The judgment of the Court is based on the ground that there was in fact a committal for the offence on which the prisoner was tried on the first count.

Appeal dismissed.

J. N. F.

Solicitors for the Appellant—*Messrs. Carter and Bell.*

Solicitor for the Respondents—*L. J. Walford.*

ALEXANDER POTTAGE.

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Severity of sentence for a first offence.
Before an order to pay towards the costs of the prosecution is made, there should be, semble, *some evidence that defendant is in a position to pay.*

Appeal against sentence.

Appellant pleaded guilty at the Devizes Borough Sessions on 9th October, 1922, before the Recorder, to embezzlement and falsification of accounts, and was sentenced for the embezzlement to three years' penal servitude and to pay 20*l.* towards the costs of the prosecution, for the falsification of accounts to twelve months' imprisonment with hard labour, the two sentences to run concurrently.

R. Holt for the appellant, who was present. Appellant had previously had an excellent character. I submit the sentences are excessive for first offences, and there was no evidence that appellant had the means to pay the 20*l.* towards the costs of the prosecution. He referred to *Shershewsky,* 28 T. L. R. 364: 1912, fifteen months' imprisonment with hard labour; confirmed: C. C. A.; *Dench,* 4 Cr. App. R. 26: 1910, sentence of three years' penal servitude reduced to eighteen months' imprisonment with hard labour.

No counsel appeared for the Crown.

Sankey J., after stating the facts: The appellant appears to be a young man at the beginning of life, being only twenty-seven years of age, and has previously borne a good character. He was in custody for nearly two months before the case was heard. In respect of the sentence we have come to the conclusion that it is too severe. The offences were serious, as the appellant occupied a position of trust, but in view of the fact that they were first offences, we consider the sentence was more severe than should have been imposed, and the original sentence will be reduced to twelve months' imprisonment with hard labour on each indictment, to run concurrently.

In regard to the order that appellant should pay 20*l.* towards

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the costs of the prosecution, there was no ground to justify this sentence, and it is quashed.

Sentence reduced.

J. N. F.

Solicitors for the Appellant—*Messrs. Norris and Hancock*, Devizes.

JOHN THOMAS.

Proviso to s. 4 of the Criminal Appeal Act applied, despite a grave irregularity in procedure at the trial and a mistaken direction on the onus *of proof.*

Application for leave to appeal against conviction and sentence.

Appellant was convicted at the Dorset Quarter Sessions on 4th October, 1922, before the Chairman, of larceny, and sentenced to five years' penal servitude.

No counsel appeared, and appellant was not present.

The LORD CHIEF JUSTICE, after stating the facts: The proceedings were marked by two unusual incidents. In the first place, at the close of the evidence counsel for the prosecution was given and took the opportunity of summing up the case for the prosecution. The prisoner was not defended by counsel, and the mere fact that the prisoner gave evidence does not, under the Criminal Evidence Act, 1898, give to the prosecution the right of reply.

In the second place it appears from the summing-up that the Chairman gave a curious direction to the members of the jury. Having referred to the evidence, he said: "I leave it to you to say whether you think the prisoner guilty or not guilty. If he is guilty I am sure that you will bring in a verdict to that effect; if you think that he has cleared himself of the charge, very well."

It is to be regretted that a reply was offered on behalf of the prosecution, and it is to be regretted that these observations misstating the burden of proof were made, but the Court considers

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that in this case there was no substantial miscarriage of justice, and applies the proviso to s. 4 of the Criminal Appeal Act, 1907, 7 Edw. 7, c. 23.

Application dismissed.

J. N. F.

JOHN SEARLE.

Severity of sentence.

Observations upon the term of penal servitude preliminary to preventive detention.

Appeal against sentence and application for leave to appeal against conviction as a habitual criminal.

Appellant was convicted at the County of London Sessions on 11th October, 1922, before the Deputy-Chairman, of housebreaking and of being a habitual criminal, and was sentenced to three years' penal servitude and five years' preventive detention.

Appellant in person.

E. Percival Clarke for the Crown.

The LORD CHIEF JUSTICE, after stating the facts of the offence of housebreaking: The facts of this old man's case are a little peculiar. He is 71 years of age, and has made to the Court a moving and reasoned appeal. He has a long record of crime and very heavy sentences. In his statement he says: "I have not had a single chance. I was sent to prison for eighteen months when only a boy. At 21 I had seven years' penal servitude and seven years' police supervision for stealing a watch worth only 15*s*. Nobody knows what I suffered in prison. I, a boy, was put among men." At the trial the learned Deputy-Chairman said: "If I could send you straight into preventive detention without passing a sentence of penal servitude I would, but I cannot."

The offence is a serious one. In the opinion of the Court it is an unfortunate circumstance that under the law as it now stands it is not possible to pass a sentence of preventive detention without

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first satisfying the condition of passing one of penal servitude, but it is a misfortune which it is not in our power to remedy. The legislature and the legislature alone can do that.

There is no doubt that the appellant in his youth suffered a severity of punishment quite out of accord with present beliefs and practices, though quite in accord with the beliefs and practices of half a century ago. I am bound to add, upon looking at his life, that he has had a sort of a chance. For his last three sentences he received only imprisonment, and it would appear that those who sentenced him stretched a point in his favour.

It seems right to us also to stretch a point in his favour, though no doubt it would be best for the appellant to go into preventive detention if that could be done without another sentence of penal servitude. In the circumstances, and with the object of giving the appellant another chance, we have decided to alter the sentence to one of twelve months' imprisonment with hard labour, to date from the date of conviction.

Sentence reduced.

J. N. F.

GEORGE ALEXANDER REDD.

Giving evidence of the previous conviction of a defendant on his trial is presumed to have such a prejudicial effect on the minds of the jury that the Court may decline to apply the proviso to s. 4 of the Criminal Appeal Act.

Where a witness volunteers evidence of the good character of a defendant without any suggestion or question by the latter tending to put his character in issue, the Crown is not entitled to cross-examine either the witness or the defendant to show that he is a person of bad character either within s. 1 (f) (ii) of the Criminal Evidence Act, 1898, *or the doctrine in* Gadbury, 8 *C. & P.* 676: 1838, per *Parke, B.*

Appeal against conviction and sentence.

Appellant was convicted at the Northamptonshire Sessions on 12th October, 1922, before the Deputy-Chairman, of housebreaking, stealing from the house and receiving, and was sentenced to seven years' penal servitude.

At the trial, appellant conducted his own defence, and a witness, Williams, called by him volunteered the statements, "He

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held a good position in the army as a warrant officer," and "As far as I know he is all right." Counsel for the prosecution at the trial thereupon asked Williams whether he was aware appellant had been convicted at Usk in 1912, and sentenced to five years' penal servitude, and also whether he was aware that appellant had been convicted no fewer than eleven times, and sentenced once to a term of five years', and once to one of three years' penal servitude. Further, in cross-examination of appellant, counsel asked him how many times he had deserted from the army.

C. K. Tatham for the appellant (under s. 10 of the Criminal Appeal Act), who was present. I submit (1) that as a matter of law there was no ground which gave the prosecution the right to refer to appellant's previous convictions; (2) that even if the prosecution had the right, when one looks at the gaps in the evidence, the case was so unsatisfactory that the conviction should be quashed. The witness Williams was called to produce a letter from the prosecutrix. He was not called as a witness to character, and later on he volunteered the statement about appellant's having held a good posititon and being "all right as far as he knew." My point is that a person is not a witness to character when he volunteers a statement. Appellant never asked him anything about his character. Counsel referred to *Gadbury*, 8 C. & P. 676: 1838. This was under (unrepealed) 6 & 7 Will. 4, 111, which enacts that if defendant "shall give evidence of his or her good character" a previous conviction is let in, but it must be his act.

The LORD CHIEF JUSTICE: The Court only wishes to hear the Crown on the following points: (1) Whether the questions should have been put. (2) Whether, if they should not have been put, there was sufficient evidence otherwise so that the jury *must* inevitably have convicted the appellant.

B. Campion for the Crown. I do not approve the questions referred to. However undesirable, I submit that the questions were technically correct. When evidence of good character is given by a witness called on behalf of a defendant, I submit such questions are permissible to correct a false impression given to the jury and to see that the jury is not misled.

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[The LORD CHIEF JUSTICE: When a defendant's character is put in issue, must it not be put in issue by some act of his own ?]

Defendant calling a witness must take the risk of what that witness may say. I submit that the evidence was sufficient to prove conclusively that appellant was the person who committed the offence, and that there was no substantial miscarriage of justice.

AVORY J.: The appellant in this case was charged with housebreaking and stealing from the house; the indictment also charged him with receiving, and he was convicted on all counts.

In the course of the trial he called a witness to produce certain letters which were not evidence, and the witness produced a letter which was read to the Court. That letter, written by the prosecutrix, contained an expression of opinion that it was the prisoner's wife who committed the theft. The witness was called for that purpose only, and then, without any question by the appellant, took upon himself to volunteer a statement that the appellant had held a good position in the army, and was all right as far as he knew. Thereupon counsel for the prosecution claimed that he was entitled to give evidence of appellant's bad character, and suggested to witness that appellant had been convicted in 1912 and sentenced to five years' penal servitude, and that he had been convicted no fewer than eleven times. Although the witness did not assent, it is impossible to say that the jury were not influenced thereby, and they would feel that a member of the Bar would not put such questions without their being well founded.

It does not rest there, for on prisoner being called as a witness he was cross-examined by counsel about the number of times he had deserted from the army, and gave an answer suggesting that there was some truth in the suggestion. The question for this Court to decide is, Was this evidence, or rather this suggestion of previous bad character, rightly put to the jury ?

The first question is not one that arises under s. 1 (f) (ii) of the Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36, but whether the case comes within or without *Gadbury* [above], and in the opinion of this Court, the rule of law is correctly stated at p. 366 of the 26th edition of Archbold's Criminal Pleading, &c. "If the prisoner endeavours to establish a good character, either by calling witnesses himself, or by cross-examining the witnesses for the

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prosecution, the prosecution is at liberty, in most cases, to give proof of the prisoner's previous convictions." The question here is, "Was the prisoner, within the meaning of the rule, endeavouring to establish a good character?" In the opinion of the Court he was not. Because a witness whom he called volunteered a statement, perhaps against his wish, about his character, it cannot be held that he was so endeavouring.

The question regarding desertion comes under the Criminal Evidence Act, 1898, and as in the opinion of the Court the statement of the witness did not amount to an attempt by appellant to establish his own good character, this question was equally unjustifiable.

The Court now has to consider the proviso to s. 4 of the Criminal Appeal Act, 1907. It has been frequently laid down that such a conviction can only be upheld if the jury would inevitably or must inevitably have come to the same conclusion. It was so laid down as far back as 1912 in *Alexander Hemingway,* 77 J. P. 15; 29 T. L. R. 13; 8 Cr. App. R. 47: 1912: c. q., and again in 1919, in *Harry Ratcliffe,* 89 L. J. K. B. 135; 122 L. T. 384; 84 J. P. 15; 26 Cox, C. C. 554; 14 Cr. App. R. 95: 1919: c. q. In this case there was undoubtedly substantial evidence on which the jury might have convicted the appellant, apart from the evidence objected to. On the other hand, it is sufficient to say that the jury might have been in doubt without this evidence, having regard to the fact that the wife of the appellant gave damning evidence against him and she was the person originally suspected by the prosecutrix.

It is impossible to say that the jury might not have doubted whether the appellant was guilty, and this Court is not prepared to say that they must inevitably have found him guilty (*a*).

Conviction quashed.

J. N. F.

(*a*) Cf. *J. Lee,* 72 J. P. 253; 24 T. L. R. 627; 1 Cr. App. R. 5: 1908: c. q., where *appellant* had unnecessarily confessed a previous conviction.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE AVORY.

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THOMAS GRAHAM.

Neglect to inform a defendant on trial that he is entitled to give evidence on oath and to call witnesses may be a ground for quashing a conviction.

Appeal against conviction.

Appellant was convicted at the Hants Sessions on 17th October, 1922, before the Chairman, of receiving stolen property, and sentenced to four months' imprisonment with hard labour.

A watch and chain with charms attached were stolen from a house by one Rushbrooke, a private R.A.M.C. Appellant, also a private R.A.M.C., was seen showing the watch to another soldier, and on being arrested said that Rushbrooke had told him it had been sent to him from home by his mother, and that as Rushbrooke did not know where to sell it, he was going to send it to London to be disposed of. Appellant repeated this statement before the magistrate, adding that he firmly believed Rushbrooke's statement. He was indicted, together with a man named Hamilton against whom no evidence was offered, for receiving, and convicted by a jury which had just before acquitted Hamilton and appellant of a similar charge. At the first trial Rushbrooke and Hamilton gave evidence on his behalf, and appellant complained that he was not given an opportunity of calling these witnesses at the second trial.

E. A. Hawke for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The summing-up was inadequate and unsatisfactory. Appellant was not asked if he wished to call any witnesses or give evidence.

Ronald Powell for the Crown. The fact that he was not told that he could call witnesses or give evidence himself is not sufficient

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to invalidate the trial. *Yeldham*, 17 Cr. App. R. 18: 1922. The summing up does not amount to misdirection.

[The LORD CHIEF JUSTICE: There were special features in that case.]

Taking into consideration that he had previously been on trial and had called these witnesses, he must have known he could call them again.

The LORD CHIEF JUSTICE, after reciting the facts: With regard to the observations on the summing-up, although it might have been fuller and more explicit, when it is considered as a whole this Court would not, merely from the nature of the summing-up, think it right to allow this appeal.

But the observations on the summing-up are reinforced by the loose way in which the matter was generally dealt with. It was necessary that appellant's explanation should be put fully before the jury, and complaint is made that he was given no opportunity of calling Rushbrooke, the admitted thief, and another witness. It is a pity that he was not given that opportunity, as it requires little imagination to think that Rushbrooke might have given evidence materially affecting the result. In *John Warren*, 73 J. P. 359; 25 T. L. R. 633; 2 Cr. App. R. 194: 1909, Channell J., in delivering the judgment of this Court, said: "The prisoner had not been told he had a right to give evidence. He ought to have been so told, though I am not sure we should have quashed the conviction on that ground alone."

In the present case, appellant was not told that he might give evidence himself or call witnesses on his behalf. It is not enough that in a previous case he was so told, if he was not in *this* case. The trial was not satisfactory, and the conviction must be quashed.

Conviction quashed.

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MARTIN COLLINS.

On an indictment for larceny "by a trick," if the facts proved establish only an obtaining by false pretences, the Court will not substitute the latter verdict unless it is satisfied in accordance with s. 5 (2) of the Criminal Appeal Act, 1907, that the jury "must," on a proper direction, have so found.

Appeal against conviction.

Appellant was convicted at the Norfolk Sessions on 11th October, 1922, before the Chairman, of larceny, and sentenced to six months' imprisonment with hard labour.

The facts of the case appear from the judgment.

S. Cope Morgan for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The facts did not amount to larceny by a trick, and I submit appellant could not therefore be convicted on this indictment.

Gerald Dodson for the Crown. I submit that upon the facts appellant could be convicted of larceny by a trick. *Russett*, 1892, 2 Q. B. D. 312; 67 L. T. R. 124; 40 W. R. 592; 86 J. P. 143; 17 Cox, C. C. 534. Should this Court consider otherwise, I submit that if the jury had been directed on the question of finding appellant guilty of obtaining the money by false pretences, they must have found appellant guilty of that offence, and s. 44 (3) of the Larceny Act, 1916, 6 & 7 Geo. 5, c. 50, entitles them to do so. In these circumstances I submit this Court should substitute that verdict under the powers conferred by s. 5 (2) of the Criminal Appeal Act, 1907, 7 Edw. 7, c. 23.

The Lord Chief Justice: The appellant in this case was convicted on an indictment which charged him with larceny of £1 6*s*. 6*d*., under s. 2 of the Larceny Act, 1916, 6 & 7 Geo. 5, c. 50. The facts of the case are a little important in view of the points raised before us. A Mrs. Holmes gave evidence that on June 8th appellant called upon her and showed her samples of some boots and shoes. She chose two pairs of shoes costing 17*s*. and 9*s*. 6*d*., and gave to appellant £1 6*s*. 6*d*., for which she was to receive two pairs of shoes, but she in fact received nothing.

The trial took an unusual course. There were eight or nine

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similar charges against the appellant, but they were not joined in one indictment under separate counts. Separate indictments were drawn for each offence. The learned counsel at the trial selected one of the indictments and, in the course of the trial of that indictment, offered evidence of offences referred to in the other indictments, and appellant was thereby put in peril upon the facts alleged on all the indictments.

It appears that to some of the persons from whom he obtained the money referred to in these indictments he represented that he was in some way connected with a firm named Dougall and Hastings, and to Mrs. Holmes he said that he represented that firm, and she expected to get the shoes from that firm. Mr. Hastings gave evidence that the firm opened a cash account with appellant, and that if appellant gave orders and paid for them, the firm would send the shoes. Mr. Dougall said that the firm would have let appellant have the shoes, but that he must pay for them.

Appellant said that he considered that he was an agent of the firm. He admitted having received the money, and that he had handed it to his wife. He said that he expected Messrs. Dougall and Hastings to act as was usual in such circumstances, and that they did not expect cash payments. Upon the facts the jury convicted the appellant of larceny by a trick, but there is an obvious difficulty in upholding the conviction.

Attention has been called to *Russett* (above). It is important to see the facts in that case and what were the principles laid down. A. L. Smith J. stated the law in a few clear words. He said: "The difference between the two offences is this; if possession only of money or goods is given, and the property is not intended to pass, that may be larceny by a trick, the reason being that there is a taking of the chattel by the thief against the will of the owner; but if possession is given and it is intended by the owner that the property shall also pass, that is not larceny by a trick, but may be false pretences, because in that case there is no taking, but a handing over of the chattel by the owner. This case, therefore, comes to be one of fact, and we have to see whether there is evidence that, at the time the £8 was handed over, the prosecutor intended to pass to the prisoner the property in that sum, as well as to give possession."

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In that case it was held that the £8 was a deposit, and that there was no passing of the property in the money. Now it is said that that decision governs the present case, but the only possible way in which such a contention could be true would be that applying the principles laid down to the circumstances would lead to a similar result.

But in this case there is no evidence to show that Mrs. Holmes paid the money by way of deposit, and no evidence to show that she did not intend to part with the property in as well as the possession of the money.

No doubt, upon the facts, if proper steps had been taken, the jury might probably have found the appellant guilty of obtaining the money by false pretences, and learned counsel has urged that this Court should, under s. 5 (2) of the Criminal Appeal Act, 1907, do what the jury might have done. Now s. 5 (2) reads: "Where an appellant has been convicted of an offence, and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that offence, not being a sentence of greater severity."

The important words in that section are "the jury must have been satisfied." There is all the difference between the words "must" and "might," and although no doubt the jury might have convicted the appellant of obtaining money by false pretences, the slightness with which that aspect of the case was considered at the trial precludes this Court from saying that the jury must have convicted of that offence, and this appeal must be allowed. The Court comes to this conclusion with the greatest reluctance in a case which has no merits.

Conviction quashed.

J. N. F.

WILLIAM CROCKER.

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13 *November.*

Hewart L.C.J.
Darling J.
Avory J.

Application for leave to appeal against conviction and sentence.

Appellant was convicted at the Dorset Assizes on October 18th, 1922, before Horridge J., of carnal knowledge of a girl under the age of sixteen, and sentenced to eighteen months' imprisonment with hard labour.

The Lord Chief Justice: In this case the girl, who was the niece of the appellant, went to his house on Good Friday, 14th April, and on two other days, to do housework, the wife of the appellant being at that time confined to her bed; the acts for which the appellant was convicted were alleged to be committed on those occasions.

In view of the girl's age the question of her consent was immaterial, and at the trial the evidence of the girl was uncorroborated, but this fact was emphatically and clearly pointed out to the jury.

However, after the clearest warning, the jury came to the conclusion that her uncorroborated testimony was sufficient, and convicted the appellant.

If the matter ended there there would be no reason to allow this application, but it appears by the statement of the appellant that he desired to call one Brewer as a witness on his behalf, but he was not in a position to do so. It is not necessary to go into appellant's reasons why he was not in a position to call Brewer, but in order to test appellant's statement why it was not possible to call Brewer, leave to appeal for that limited purpose alone is granted.

Application granted.

J. N. F.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE SALTER.

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WILLIAM CROCKER.

On the trial of a sexual offence against a female, her evidence need not necessarily in law be corroborated.

See p. 45.

F. J. Tucker for the appellant (under s. 10 of the Criminal Appeal Act), who was present.

A witness named *Brewer* gave evidence of having seen the girl against whom the offence was committed in a compromising attitude with boys on the first Saturday in February.

[THE LORD CHIEF JUSTICE: On what grounds do you say this evidence is admissible?]

I call this evidence to show that her condition is consistent with someone else's misconduct.

[SALTER J.: This evidence goes back two months earlier than is consistent with the doctor's evidence that connection took place in April.

THE LORD CHIEF JUSTICE: In our opinion this evidence cannot proceed further.]

Tucker. I wish to submit that the evidence in this case was such that the verdict of the jury was unsatisfactory and should be set aside. The only evidence against the appellant was the uncorroborated evidence of the girl.

[THE LORD CHIEF JUSTICE: When all this was pointed out to the jury, do you say that this Court should interfere if there was a case to go to the jury?]

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Salter J.

In *Baskerville,* 1916, 2 K. B. 658; 86 L. J. K. B. 28; 115 L. T. Rep. 453; 80 J. P. 446; 25 Cox, C. C. 524; 60 S. J. 696; 12 Cr. App. R. 81, Lord Reading C.J., in delivering the judgment of this Court, said: "This Court, in the exercise of its powers, will quash a conviction, even when the judge has given to the jury the warning or advice above mentioned, if this Court, after considering all the circumstances of the case, thinks the verdict unreasonable or that it cannot be supported having regard to the evidence."

[SALTER J.: That was the case of the evidence of accomplices. Is corroboration necessary in sexual cases?]

In *J. A. Graham,* 74 J. P. 183; 4 Cr. App. R. 218: 1910, a case similar to this, I admit, Channell J., in delivering the judgment of this Court, said corroboration is not necessarily required, but in that case there was corroboration of parts of the girl's story.

In this case I submit that the very careful summing-up of the learned judge points to my contention that the verdict is not a satisfactory one.

W. D. Coleridge, for the Crown, was not called upon.

The LORD CHIEF JUSTICE, after stating the facts: At the trial the learned judge put clearly to the jury that there was no corroboration. He did so both at the beginning and at the end of his summing-up and also in other passages.

When this case was mentioned to this Court a short time ago, the application was allowed so that evidence which might have been of material assistance could be called, but when it came to be given the witness deposed to something which occurred on the first Saturday in February, and it then became obvious that his evidence could not supply an alternative source of pregnancy, and the appeal comes back to the fact that, notwithstanding the clear warning of the learned judge, the jury did convict, and it has been argued that the verdict should be set aside as unsatisfactory.

The law regarding the corroboration of the evidence of accomplices has been referred to.

In *Baskerville,* 1916, 2 K. B. at p. 663, Lord Reading C.J., pointed out that "it has long been a practice at common law

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WILLIAM CROCKER.

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for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence."

Now that is the law regarding the evidence of accomplices, but this Court cannot accept the contention that the evidence of a girl, the victim of the offence, is on the same plane with that of the evidence of an accomplice. The objection in such a case as this is not on the grounds of complicity, but because the case is one of an oath against an oath.

If, therefore, it is within the province of a jury to convict on the uncorroborated evidence of an accomplice, how much more is it within their province here.

The jury had the opportunity of seeing and hearing the witnesses, and there are persons—especially young persons—who somehow are able to convey the fact that the story they tell is true, and here, after the learned judge's warnings, the jury came to the conclusion that the girl's story was true and ought to be acted upon.

The Court considers that it would be a new departure if it allowed this appeal, as it cannot usurp the functions of the jury.

Appeal dismissed.

J. N. F.

JOHN HAMILTON.

Observations by the Court on summings-up by lay members of Quarter Sessions.

Application for leave to appeal against conviction and sentence.

Appellant was convicted at the West Kent Sessions, on 20th October, 1922, before the Deputy-Chairman, of garage-breaking, and sentenced to twelve months' imprisonment with hard labour.

DARLING J., after dealing with the facts: The Court is not going to set aside this conviction, but we wish to point out that the summing-up left much to be desired.

Gentlemen presiding at Quarter Sessions must put cases clearly

and carefully to the jury and deal adequately with the facts when summing up. They should take care to assist the jury by putting all necessary facts before them, and this is not always done. The Court regrets that it has to say this about gentlemen who do this work gratuitously and often so very well.

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27 *November.*
JOHN HAMILTON.
Darling J.

Application dismissed.

J. N. F.

GEORGE HUMPHREY.

Severity of sentence, after a long interval of honest life.

Appeal against sentence.

Appellant, who was present, was convicted at the Lincolnshire (Lindsey) Sessions, on 20th October, 1922, before the Deputy-Chairman, of housebreaking, and sentenced to five years' penal servitude.

The LORD CHIEF JUSTICE: The appellant's record shows that he has served several terms of imprisonment and two of penal servitude. He was last convicted in October, 1913, and sentenced to three years' penal servitude. After serving that sentence and the *remanet* of another sentence, he enlisted in the Army three days after his discharge from prison. In August, 1918, he was demobilised with a fair character, and in March, 1919, he rejoined the Army, and was discharged in April, 1920, with a good character. He has been out of prison for some six years without committing an offence, and, taking into consideration his service and character in the Army, we reduce his sentence from five years' penal servitude to eighteen months' imprisonment with hard labour.

Sentence reduced.

J. N. F.

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27 *November.*

Hewart L.C.J.
Darling J.
Salter J.

JOHN BARKER.

Sentence mitigated in view of military service.

Appeal against sentence.

Appellant, who was present, was convicted at the West Kent Sessions, on 20th October, 1922, before the Chairman, of garage-breaking, and sentenced to three years' penal servitude.

The Lord Chief Justice: The appellant has three or more convictions recorded against him, and in 1911, at the Middlesex Sessions, he was sentenced to seven years' penal servitude for burglary. On his release in 1917 he joined the Army, from which he was discharged with a good character, and was in regular employment till July, 1921. Taking into consideration appellant's services in the late war and also the South African war, we reduce his sentence to eighteen months' imprisonment with hard labour.

Sentence reduced.

J. N. F.

EDWARD MARTIN.

Severity of sentence.

Appeal against sentence.

Appellant, who was present, was convicted at the Essex Sessions, on 18th October, 1922, before the Chairman, of shopbreaking, and sentenced to three years' Borstal treatment.

The Lord Chief Justice: The appellant was not recommended for Borstal treatment, but it was reported by the police that he had apparently no parents and no home.

He subsequently disclosed his identity, and that he had a good home and had been in the Army. Enquiries confirm the appellant's statement, and the sentence of three years' detention in a Borstal institution will be set aside, and the appellant will be bound over in the sum of £5 to come up for judgment if called upon.

Sentence reduced.

J. N. F.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE DARLING AND MR. JUSTICE SALTER.

CHARLES CARTER.

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4 *December.*

Pending charges against a convicted person ought, if possible, to be dealt with at the time of conviction, or failing that, as soon as may be before sentence expires.

Application for leave to appeal against sentence.

Applicant was convicted on 31st October, 1922, at the Chelmsford Assizes, before Bray J., of larceny, and sentenced to twelve months' imprisonment with hard labour.

A. Bryan for the applicant, who was not present.

The LORD CHIEF JUSTICE: It has been pointed out that there were and are other cases pending against the appellant. It is clear that if at this trial appellant had admitted those charges they would have then been taken into consideration in his sentence, but he denied them.

It is highly desirable that such charges should not be held hanging over his head.

In *John O'Sullivan*, 6 Cr. App. R. 7: 1910, Pickford J. said: "I think this Court has said on more than one occasion that, in circumstances of that kind, it is not right to keep the other charge hanging over the prisoner's head, and that you should proceed with the other charge during the time he is serving the sentence for the first offence. That course has been pointed out as an advisable one by the circular of the Home Office dated 20th August, 1906."

It seems desirable to this Court that that observation should be repeated.

Application dismissed.

J. N. F.

Solicitors for Appellant—*Alfred Slater & Co.*

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4 *December.*

Hewart L.C.J.
Darling J.
Salter J.

FRANK EDMUND CHARD.

The Court would welcome a change in the law that to found a sentence of preventive detention a sentence of penal servitude must be imposed.

Appeal against sentences.

Application for leave to appeal against convictions.

Appellant was convicted at the Bristol Assizes, before Horridge J., of obtaining goods and money by false pretences, and of being a habitual criminal, and was sentenced to three years' penal servitude and seven years' preventive detention.

T. J. O'Connor for the appellant (under s. 10 of the Criminal Appeal Act), who was present.

J. H. Thorpe for the Crown was not called upon.

The Lord Chief Justice: Observations have frequently been made in this Court upon the law as it now is under the Prevention of Crime Act, 1908, 8 Edw. 7, c. 59. Under s. 10 of that Act, in order that the Court may pass a sentence of preventive detention, the primary crime of which the accused is convicted must be of such a nature as to call for a sentence of penal servitude; in other words, a sentence of penal servitude is a condition precedent to a sentence of preventive detention, a provision of the law which may well call for consideration.

If the Court thought that this sentence of penal servitude was passed merely that a sentence of preventive detention might be awarded, the appeal might succeed, but having regard to the charges in this case and the record of the appellant, we cannot say that the sentence was not well merited.

Appeal and application dismissed.

J. N. F.

ROBERT CHARLES WANNELL.

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4 *December.*

Hewart L.C.J.
Darling J.
Salter J.

Camelleri, 16 *Cr. App. R.* 162, 1922, *followed.*
Severity of sentence.

Appeal against conviction and application for leave to appeal against sentence.

Appellant was convicted on 8th November, 1922, at the Swansea Assizes, before Shearman J., of sodomy, and sentenced to three years' penal servitude.

Iltyd Allan for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The learned judge wrongfully admitted a written complaint made by the youth against whom the offence was committed. It was committed in a cell, and he passed the written complaint under the door.

[The Lord Chief Justice: This point was fully considered this year in *Camelleri*, 1922, 2 K. B. 122; 91 L. J. K. B. 671; 127 L. T. Rep. 228; 86 J. P. 135; 66 S. J. 667; 16 Cr. App. R. 162.]

I submit it would be a serious extension of the principle of law generally to admit complaints of this sort.

Morgan Evans for the Crown was not called upon.

The Lord Chief Justice: This question, or a question similar to this, was fully considered in the case of *Camelleri* (above).

In that case the boy upon whom the offence was committed was fifteen years of age, and in this case it is a youth of nineteen years, and counsel for appellant has admitted that he cannot suggest any reason for differentiating the two cases.

It may be, as was said in the case of *Camelleri*, that this Court may have at some time to consider the limits that are to be imposed on the admission of such evidence. There are other circumstances in this case which seem to make it right to reduce the sentence imposed. We have consulted with the learned judge who imposed

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ROBERT CHARLES WANNELL.

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the sentence, and with his concurrence we are of opinion that it might suitably be reduced to eighteen months' imprisonment with hard labour.

Sentence reduced.

J. N. F.

ARTHUR MORGAN.

Bigamy—Severity of sentence.

Appeal against sentence.

Appellant, who was present, was convicted on 16th November, 1922, at the Warwick Assizes, before Lush J., of bigamy, and sentenced to three years' penal servitude.

The LORD CHIEF JUSTICE: The woman with whom the appellant contracted the bigamous marriage said that she discovered two months after her supposed marriage that appellant was already married, and that she thought it best to continue living with him and to do as well as she could for him. Appellant has since made the statement that she knew before they went through the marriage ceremony that he was married, but his statement is not trustworthy.

It must not be thought that because a woman against whom this offence has been committed thinks it expedient in the circumstances, after discovering the true facts, to continue living with the offender, the gravity of the offence of bigamy is necessarily diminished. But in the circumstances of this case the Court is of opinion that the sentence should be reduced to eighteen months' imprisonment with hard labour.

Sentence reduced.

J. N. F.

THEODORE FRASER DUGDALE.

1922
11 *December.*

Hewart L.C.J.
Darling J.
Salter J.

The Court will not hear medical evidence on the question whether a convict is fit to undergo corporal punishment.

Appeal against conviction.

Appellant was convicted, at the Nottingham City Assizes, on 8th November, 1922, before Lush J., of procuration, and sentenced to twenty-one months' imprisonment with hard labour and to fifteen strokes with the cat.

E. W. Cave, K.C. (with him *Tinsley Lindley*), for the appellant, who was present. I do not desire to take the grounds of appeal, but I do desire to be allowed to call evidence that appellant is a person who suffers from epileptic fits and is not a fit person to undergo corporal punishment.

[The Lord Chief Justice: Every sentence of corporal punishment is subject to the reports of the medical officials, and the reports here say that there is no reason why appellant should not undergo the punishment awarded.]

Those reports were prepared without the information these witnesses have.

The Lord Chief Justice: We have considered this application, and we cannot hear this evidence. It would be a new departure for this Court. The responsibility for carrying out that part of the sentence rests in certain hands and not upon the Court of Criminal Appeal. If ever there was a case which deserves corporal punishment this is that case.

J. G. Hurst, K.C., and *Richard O'Sullivan* for the Crown, were not called upon.

Appeal dismissed.

J. N. F.

Solicitor for Appellant—*W. E. Comery*, of Nottingham.

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OWEN RICHARD WILLIAMS.

Hewart L.C.J.
Darling J.
Salter J.

S. 3 (2) *of* 48 *&* 49 *Vict. c.* 69, *the Criminal Law Amendment Act*, 1885, *does not supersede either the common or statute law of rape, but is an addition to the latter.*

O'Shay, 19 *Cox, C. C.* 76: 1898, *overruled.*

Appeal against conviction.

Appellant was convicted, at the Liverpool Assizes, on 10th November, 1922, before Branson J., of rape and indecent assault, and sentenced to seven years' penal servitude and twelve months' imprisonment with hard labour.

The appellant was choirmaster at a Presbyterian chapel, and gave lessons in singing and voice production to two girls aged 16 and 19 years. Under pretence of testing their breathing powers with an instrument, he had sexual connection with the younger, and was permitted to assault the elder.

Elliot Gorst, for the appellant (under s. 10 of the Criminal Appeal Act), who was present. The facts do not constitute the offence of rape, *O'Shay*, 19 Cox C. C. 76: 1898.

He cited the definition in Stephen's *Digest*, Art. 270, p. 205, 5th ed.

[The Lord Chief Justice: The question is whether what was done was done with the girl's real consent. He referred to *Young*, 14 Cox C. C. 114: 1878.]

This case is now covered by s. 3 (2) of the Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 69, which makes this offence a misdemeanour.

[The Lord Chief Justice: Before the passing of that Act, the cases of *Case*, 1 Den. C. C. 580; T. & M. 318; 4 New Sess. Cas. 347; 19 L. J. M. C. 174; 14 Jur. 489; 4 Cox C. C. 220: 1850, and *Flattery*, 48 L. J. M. C. 130; 2 Q. B. D. 410; 36 L. T. Rep. 32; 25 W. R. 398; 13 Cox C. C. 388: 1877, C. C. R., where consent was obtained by fraud, were held to be rape, as there was no real consent. Do you say that, after the passing of the Act of 1885, those cases could not properly be held to be rape?]

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OWEN RICHARD WILLIAMS.

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No, but there is the case of *Barrow*, 38 L. J. M. C. 20; L. R. 1 C. C. R. 156; 19 L. T. Rep. 293; 17 W. R. 102; 11 Cox C. C. 191: 1868, which has never been overruled, although it has been doubted.

[DARLING J. referred to the case of *Dicken*, 14 Cox C. C. 8: 1877.]

Noel Goldie, for the respondents, was not called upon.

The LORD CHIEF JUSTICE: Counsel for the appellant has taken one point and one point only, that is, that, in view of the evidence disclosed, the appellant could not be legally convicted of rape, and for the purpose of enforcing that argument he refers to *O'Shay* (above) and s. 3, sub-s. 2, of the Criminal Law Amendment Act, 1885. Now, no doubt, before the Act of 1885, a man who by false pretences succeeded in obtaining sexual intercourse with a woman could be convicted of rape, *Case* (above) and *Flattery* (above); but it is said that matters were changed by the passing of the Act of 1885. Counsel for the appellant did not go so far as to say that the case of *Flattery* was no longer law, but he did say that, in such a case as the present, it was impossible to indict a person for rape. By s. 3, sub-s. 2, of the Act of 1885, it was enacted that "any person who by false pretences or false representations procures any woman or girl, not being a common prostitute or of known immoral character, to have any unlawful carnal connection, either within or without the King's dominions, shall be guilty of a misdemeanour." These words, it is obvious, go far beyond the case of rape, and one would not be at a loss to imagine many cases, comprehended by the words of that sub-section, which were not rape. That sub-section was dealt with in the case of *O'Shay*, and in that case Ridley J. did appear to say that, after the passing of the Criminal Law Amendment Act, 1885, the case of *Flattery* was no longer law. It is quite clear, when one looks at the report of that case, that attention was not called to s. 16 of the Act, which section enacts that "this Act shall not exempt any person from any proceeding for an offence which is punishable at common law or under any Act of Parliament other than this Act, so that a person be not punished

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OWEN RICHARD WILLIAMS.

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twice for the same offence." It is perfectly clear that s. 3, sub-s. 2, of the Act of 1885 does not override the common law, but makes an addition to the common law and statute law, and it seems clear that the decision in the case of *O'Shay* was given under a misapprehension, and has no binding effect. Mention has been made of the case of *Dicken* (above). In that case it was argued that, as by s. 4 of 38 & 39 Vict. c. 94, it was enacted that "whosoever shall unlawfully and carnally know and abuse any girl being above the age of twelve years and under the age of thirteen years, whether with or without her consent, shall be guilty of a misdemeanour," earlier statutes making the offence rape in such cases were repealed. But Mellor J. said: "The law remained exactly as it was previously—that is to say, if she consented, the prisoner might be convicted of the statutory misdemeanour; if she did not, *à fortiori*, he might be so. But if she did not consent, his offence would amount also to the higher crime —the felony—of rape, and he might be indicted and tried for it quite irrespective of the modern statutes throwing special protection round children. . . . The present indictment is for rape, and therefore if the girl consented to the carnal knowledge, the act was not done 'against her will,' and the crime is not made out. It would be preposterous to suppose that Parliament intended to repeal the law of rape as to girls of the very age during which extra statutory protection is cast over them, and I am clearly of opinion that no such repeal has been effected." In the present case the argument must be that, after the passing of the Act of 1885, it is no longer possible to indict for rape in such cases as those of *Flattery* and *Case*, and that as there is this statute, it is no longer rape to obtain possession of a woman without her real consent. When one looks at s. 16 of the Act that argument is obviously untenable. Here the appellant pretended that what he was doing was a necessary operation. The girl never consented to an act of sexual intercourse; she consented to the act not because she thought it was an act of sexual intercourse, but because she believed it was a necessary operation.

In *Russell on Crimes*, 7th edition, 1909, Vol. I. at p. 934, where reference is made to such cases as this, including *Young* (above), it is said: "A consent or submission obtained by fraud is, it would seem, not a defence to a charge of rape or cognate offences."

That, in the opinion of this Court, is the true law (*a*), and nothing in the Criminal Law Amendment Act, 1885, has affected it.

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OWEN RICHARD WILLIAMS.

Hewart L.C.J.

Appeal dismissed.

J. N. F.

Solicitor for the Respondents—The Town Clerk of Liverpool.

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12 *December.*

SIMON NYBERG.
ALFRED WHITE.

Application for leave to appeal.

The appellant Nyberg was convicted, at the Central Criminal Court, before Roche J., on 3rd November, 1922, of riot, and sentenced to twenty-one months' imprisonment with hard labour.

The appellant White was convicted, at the same time, of shooting with intent to do grievous bodily harm, of being in possession of firearms with intent to endanger life, and of riot, and was sentenced to five years' penal servitude and two years' imprisonment with hard labour, to run concurrently.

Cecil Whiteley, K.C. (with him *J. D. Cassels*), for the appellant White, who was not present. The main ground for this application is the wrongful admission of evidence by the learned judge at the trial. The whole question was one of identity and whether in fact White fired or was in possession of firearms.

Three witnesses made statements to the police. At the trial they said those statements were not true.

A Mrs. Sage said in her statement that White fired, but in the witness-box she did not identify White, and was treated as a hostile witness. Her statement was treated as evidence against White, but, assuming the jury were entitled to take into consideration the fact that witness had made another statement, they were not entitled to take into consideration the facts of that statement. [He was stopped by the Court.]

(*a*) And not, *semble*, that cited from Stephen, *arguendo*.

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SIMON NYBERG.
ALFRED WHITE.

Darling J.

DARLING J.: This is merely an application for leave to appeal, and on the grounds indicated the Court grants leave.

Application granted.

J. N. F.

Solicitor for Applicant White—*C. C. Sharman.*

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December.

SYMON NYBERG.

Nyberg, who was present, was not represented, and his application was refused.

ALFRED WHITE.

Where a witness for the prosecution proves "adverse" and is shown to have "made at other times a statement inconsistent with his present testimony," such statement is not evidence against the accused of the allegations which it contains, but is relevant only to the credit of the witness.

Whiteley, K.C. (with him *Cassels*), for the appellant, who was present.

The sole issue at the trial in this appellant's case was his identity, and one ground of appeal was that on this issue evidence was improperly received, despite objection taken by counsel defending (*Cassels*). The chief witness against him was one Gilbert, who swore positively that both West and White were present on the occasion of the fight and riot on August 19th, that both fired shots and that White fired at him (Gilbert). But West proved a conclusive *alibi* and was acquitted by the direction of Roche J. Now Gilbert and several of the Crown's witnesses had made (unsworn) statements to the police on August 19th, or soon after, implicating White and other persons (some of whom had been acquitted and some convicted), but at the trial they swore that these statements were untrue in so far as they affected White *criminally:* some of them now swore that they did not see him at the place in question

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ALFRED WHITE.

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and some that they did not see him fire a revolver. The Crown, alleging that the witnesses had been terrorised, was allowed to treat them as hostile witnesses and they were cross-examined, but they maintained that their sworn deposition at the trial was truthful. When the Crown proposed to put the statements to the police to them in cross-examination, counsel for the defendant objected, but Roche J. overruled him, saying, "I only say that that statement is admissible, not that its contents are true: that is a question for the jury": that can only mean that the jury had the right to decide that what the statement contained was true. The statement was then read, and so of several other witnesses. It is submitted that all these statements were inadmissible.

Section 3 of 28 & 29 Vict. c. 18 ("Denman's Act," 1865) is: "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may in case the witness shall, in the opinion of the judge, prove adverse contradict him by other evidence or by leave of the judge prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." I submit that the result of such evidence *contradicted* is to the party producing purely negative: he can get no advantage from it.

[DARLING J.: So that it comes to this: if, after such contradiction, you convict, you convict on the unsworn and not on the sworn evidence.]

Yes; what he now says on oath is the evidence to go to the jury.

[The LORD CHIEF JUSTICE: By leave of the judge you could also call a third person to prove the inconsistent statement. In that case is the effect of it merely to destroy the value of the hostile witness's evidence or does it go to prove the first statement?]

Not being made in defendant's hearing, it cannot possibly be evidence against him. The proper net inference from such evidence is that the jury can believe none of it.

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[The LORD CHIEF JUSTICE: You come back to normal—neither *plus* nor *minus*.

DARLING J.: Section 3 is simply s. 22 of 17 & 18 Vict. c. 125 (the Common Law Procedure Act, 1854): it is extended from civil to criminal cases.]

It really gives a witness a *locus pœnitentiæ* to avoid perjury. Even before 1865 if the judge thought the witness was adverse he would allow counsel to cross-examine to the previous statements: but it was a moot point whether you could prove that it was made: it was something like cross-examination to credit.

[The LORD CHIEF JUSTICE: Suppose that you are cross-examining a witness of the opposite side and you put a previous statement to him, *e.g.*, a signed proof, and he says "I was mistaken when I said that," may you say to the jury "Don't you think that previous statement was true?"]

Section 4 deals with that: "If a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the indictment or proceeding and inconsistent with his present testimony does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but . . ." —then follows exactly the same condition as in s. 3 (above).

[SALTER J.: Section 3 is confined to the evidence wherewith you may impeach your own witness: it does not deal with the limits of cross-examination of a witness who proves adverse.]

One witness actually swore that the statement at the police station was due to intimidation, and that she was now telling the truth.

Counsel went through all the depositions of identification and submitted that the result was that Gilbert alone testified to appellant's shooting. Appellant gave evidence and set up an *alibi* for the critical moment. He submitted that there was, therefore, no evidence to go to the jury. During the war the Judge-Advocate-General constantly advised that when sworn evidence neutralised unsworn there was in law no evidence at all. The nearest case in

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this Court, where the proviso to s. 4 of the Criminal Appeal Act was not adopted, is *Norton*, 1910, 2 K. B. 496; 79 L. J. K. B. 756; 102 L. T. 926; 74 J. P. 375; 54 S. J. 602; 26 T. L. R. 550; 5 Cr. App. R. 7, 65: c. q.

Perceval Clarke (with him *E. Fulton*) for the Crown.

[The LORD CHIEF JUSTICE: (1) Assuming that it is a true inference from the summing-up that the jury were directed to choose between the truth of the two statements, can that be supported? and (2) if not, must the jury inevitably have found "guilty" on the other evidence?]

Dibble, 72 J. P. 498; 1 Cr. App. R. 155: 1908: c. q., is in appellant's favour; but *John Williams*, 77 J. P. 240; 29 T. L. R. 188; 8 Cr. App. R. 133: 1913, is not.

[The LORD CHIEF JUSTICE: There the original statement was sworn.]

I submit that the distinction does not arise because all evidence at the trial is sworn. The *only* mistake our witnesses made was in recognising West and White.

[The LORD CHIEF JUSTICE: In *Williams* the discrepancy was only about the date and the jury were directed to look at all the facts together. No doubt they were so directed here, but passages of the summing-up are quite precise that everything depended on Gilbert's evidence: then where is his corroboration? The answer seems to be:—in the earlier statements which were negatived.]

Counsel cited s. 5 of the Act of 1865, under which he put in at the trial the statements in question.

The real question for the jury was appellant's *alibi*, but there were other issues, *e.g.*, that of riot, which were not affected by these statements.

The LORD CHIEF JUSTICE: In this case it appears that, certain witnesses for the Crown having proved adverse, and being then

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confronted with statements which they had previously made in the absence of the appellant, admitted having made those statements, but swore that the statements were mistaken. The learned judge, however, in summing-up would seem in more than one passage to have invited the jury to choose between the sworn testimony of the witness in the box and the statement previously made by him in the absence of the appellant. The law upon the matter is sufficiently clear, and its history is interesting. In the middle of last century, for example, doubts were entertained whether a person to whom the former statement was made might be called to contradict the witness. In 1850, in *Melhuish* v. *Collier,* 15 Q. B. 878, at p. 890, Erle J. said: "A plaintiff's witness says in effect that the plaintiff has no cause of action. Then he is asked whether he has not formerly made a different statement. I think that question is proper and not inconsistent with the rule that a party knowing a witness to be infamous ought not to produce him and must not be allowed to take the chance of his answers and then bring evidence to contradict him. We do not interfere with that rule. There are treacherous witnesses who will hold out that they can prove facts on one side in a cause and then for a bribe or from some other motive make statements in support of the opposite interest. In such cases the law ought undoubtedly to permit the party calling the witness to question him as to the former statement and ascertain, if possible, what induces him to change it. It is not now necessary to ask whether a person to whom the former statement was made may be called to contradict the witness, for it was not done here. The point is one upon which judges have differed and opinions may vary to the end of time . . ." But the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, removed the doubt in civil cases, and the Criminal Law Procedure Act, 1865, 28 & 29 Vict. c. 18, removed the doubt in criminal cases. The topic, however, with which s. 3 of the latter Act (reproducing s. 22 of the earlier Act) is dealing is the limits within which a party producing a witness may impeach the credit of that witness. Quite obviously it is one thing to say that, in view of an earlier statement, the witness is not to be trusted: it is another thing to say that his present testimony is to be disbelieved and his earlier statement, which he now repudiates, is to be substituted for it. See *Dibble* (above) and also *J. Williams*

(above). In this case it is not possible to hold that the jury must inevitably—or, as the other phrase is, would certainly—have returned the same verdict after a proper direction, inasmuch as the question whether Gilbert's evidence was really corroborated was a crucial question. But the appeal is devoid of substantial merits, and we come to our present conclusion reluctantly.

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Conviction quashed.

H. C.

Solicitor for Appellant—*C. C. Sharman.*

WILLIAM WARD.

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Fresh evidence reducing murder to manslaughter.

Application for leave to appeal against a conviction for murder at Leeds Assizes on December 15th: appellant was sentenced to death by Greer J. Applicant was present.

The facts sufficiently appear from

A. Morley's application (under s. 10 of the Criminal Appeal Act) on appellant's behalf to call fresh evidence, to which the Court acceded. The witnesses would depose to facts of which there was no direct evidence at the trial, though suggested by the defence.

He then called a farmer, one of his labourers, a lady probationer nurse from Doncaster Hospital, and a police doctor (who was a witness at the trial), some of whom were cross-examined by

Lowenthal for the Crown.

In the result it was undisputed that earlier in the day on October 30th, when the deceased died, he had sustained a severe fracture of the skull by falling from a cart, but that nothing of this accident was known at the common lodging-house where he

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slept next to the appellant, who suggested that he caught deceased stealing from under his pillow in the night, and that he had then used the violence which the jury had believed had led to death. Appellant got out of bed and struck the deceased, and finally dragged him out of the ward and threw him downstairs: the latter neither spoke nor offered any resistance the whole time. The medical evidence attributed death to a fracture of the skull. Counsel suggested that the new facts showed that the injuries from the accident were more serious than was suspected at the trial, and that the man was dead when appellant threw him out of the ward and downstairs.

The Court was satisfied on these facts that the jury at the trial would, if they had heard to-day's evidence, have probably convicted only of manslaughter, and it substituted that verdict with a sentence of eighteen months' imprisonment with hard labour.

Verdict and sentence varied.

The Court declined to hear argument by *Morley* that under s. 5 (2) of the Criminal Appeal Act they had no power to substitute this verdict.

H. C.

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FREDERICK EDWARD FRANCIS BYWATERS.

It is within the discretion of the judge at the trial whether defendants jointly indicted shall be tried severally, and unless one has been prejudiced by such joint trial this Court will not interfere, though it may hear appeals of such defendants separately.

Appeal against conviction.

Appellant was convicted, with Mrs. Thompson (see p. 71, below), on December 11th, 1922, at the Central Criminal Court, of the murder of her husband on October 3rd and sentenced, after five days' trial, by Shearman J. to death.

Whiteley, K.C. (with him *Huntly Jenkins* and *Myles Elliott*), for appellant, who was present. The defence was that Mr. Thompson was killed by appellant in warding off an attack and that he

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was entitled either to be acquitted or to be convicted of manslaughter only in view of provocation.

It is submitted that the learned judge did not exercise his discretion judicially in refusing an application for separate trials of the two prisoners. He cited *G. Blake*, 4 Cr. App. R. 275; 74 J. P. 336: 1910; *E. Taylor*, 5 Cr. App. R. 168: 1910 (habitual criminal: *a fortiori* in murder); and with regard to election by counsel for the Crown, *E. Curtis*, 9 Cr. App. R. 9; 29 T. L. R. 572: 1913; *Yousry*, 84 L. J. K. B. 1272; 112 L. T. 311; 31 T. L. R. 27; 11 Cr. App. R. 13: 1914; *Lee and Parkes*, 13 Cr. App. R. 39: 1917; *Gibbins and Proctor*, 82 J. P. 287; 13 Cr. App. R. 134: 1918. Here there could be no "embarrassment" of the prosecution. On the interpretation of "judicial discretion," counsel cited *Starkie*, 16 Cr. App. R. at 66; 38 T. L. R. 181: 1921.

Notwithstanding the enabling power of the Indictments Act, 1915, a count for murder ought to stand alone: here there was a second joint indictment against both prisoners for conspiracy to murder by poison—*not* by violence. A manifest injustice was done to appellant because by trying the two together that issue was inevitably confused with that of murder, and the evidence and cross-examination of the female defendant was used against appellant. In the whole annals of our Courts there is no instance of evidence being offered of acts of violence against the deceased by a defendant on his trial for poisoning.

Then, too, her letters to appellant were admitted, despite objection, to prove motive, but they were not only used to establish motive but to prove the previous conspiracy to poison, for which there was another indictment: this could not have happened if they had been tried separately, for she would not have been called. Moreover, he was constantly asked what *she* meant by *her* words. This was further unjust, because it put him in the position of being invited to hurt her case. When she did to an extent inculpate him I could have cross-examined her, but then I should have been in that position.

Another point is that though it is now the practice for a Law Officer of the Crown to have the last word, as the Solicitor-General did here, yet, as the privilege only rests on a resolution of the judges in 1884, which cannot override a statute, as I only called the appellant, under the statute of 1898 I was entitled to the last

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word. 28 & 29 Vict. c. 18, 1865, "Denman's Act," is clear. See *Attorney-General* v. *De Keyser's Hotel, Ltd.*, 1920, A. C. at 526 and 537, *per* Lord Dunedin, Lord Atkinson, and Lord Parmoor.

The Solicitor-General (with him *Travers Humphreys* and *R. Oliver*) for the Crown was not called on.

The LORD CHIEF JUSTICE: This appeal has not been heard with Mrs. Thompson's appeal in order to spare this appellant's feelings. After stating the facts of the crime, his Lordship continued:—

Many of her letters have been preserved, and those letters were certainly used as some material to help the jury to arrive at a true conclusion with regard to this appellant. It is not necessary, in dealing with this appeal, to enter further into the nature of the contents of the letters, but it was said by counsel that it was wrong for the appellant and Mrs. Thompson to be tried together. That was the first ground of the appeal. Decisions have been given again and again by this Court—the cases are so numerous that it is not necessary to refer to them—that it is a matter of judicial discretion whether two persons should or should not be tried separately. In this case the learned judge, exercising his discretion, decided that the present appellant and Mrs. Thompson should be tried together. In the opinion of this Court there is no ground at all for unfavourable criticism of that decision. On the contrary, this was clearly a case in which, in the interests of justice, it was desirable that the two prisoners should be tried together.

It was said that the effect was that many of the letters written by Mrs. Thompson to the appellant were used as material from which the jury might form an unfavourable conclusion with regard to Bywaters, but exactly the same thing would have happened if the prisoners had been tried separately. In the one case, as in the other, the letters would have been given in evidence. It was further said that the result of the trial of the two persons together was that Mrs. Thompson became, as otherwise she might not have been, a witness in the case against Bywaters. No doubt, if the result of trying together two persons who might have been tried separately had been a miscarriage of justice this Court would interfere. But what is meant by miscarriage of justice? It means that a person has been improperly found guilty. It is idle to suppose

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that a miscarriage of justice has taken place if a prisoner against whom there is overwhelming evidence suffers some further evidence because another prisoner goes into the witness-box. No doubt, where the defence of one accused person is to incriminate another that is a good reason for not trying them together. In the opinion of this Court it was helpful in the administration of justice—which has no other object than to arrive at a true conclusion—that Mrs. Thompson should give evidence, and her evidence assisted the jury to come to a right conclusion not only in her own case, but also in that of Bywaters. Counsel had said that there was no evidence at all that Mrs. Thompson did anything to aid and abet the actual commission of this crime on the night of October 3rd. That is a matter which may have to be considered in the next appeal, but so far as it is employed on behalf of Bywaters I am not prepared for a moment to admit that there was no evidence that Mrs. Thompson aided and abetted the commission of the crime. On the first ground of the appeal the Court thinks that the learned judge exercised his discretion wisely and well.

The second ground of appeal is that as the Solicitor-General was leading counsel for the prosecution he had exercised the right of reply, and it is contended that, at any rate since the passing of Lord Denman's Act, the Criminal Procedure Act of 1865, the Law Officers of the Crown have not the right of reply. Authority for that proposition is sought to be derived from cases where the prerogative of the Crown superseded by statute has been considered. The argument fails because the Act of 1865 was not dealing with this matter at all, and it was long after that date that the resolution of the judges was taken—namely, in 1884. That was not an enabling resolution, but a resolution which had a limiting effect, namely this, that in those Crown cases in which the Attorney-General or the Solicitor-General is personally engaged, a reply, where no witnesses are called for the defence, is to be allowed as of right to the counsel for the Crown and in no others. That is the existing state of the law, and if it is to be altered it must be altered elsewhere. At present, when a Law Officer of the Crown appears in a Crown case—which is no "mere accident"—what it means is that those who have to deliberate upon the matter have come to the conclusion that it is a case in which in the interests of justice it is right that a Law Officer of the Crown should appear—he can in his discretion exercise the right which he lawfully

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possesses. In this case there is no ground for the suggestion that the defence was prejudiced by what the Solicitor-General said in a speech of studious moderation.

There is nothing in the remaining points. The summing-up in the case of Bywaters filled in the transcript of the shorthand note an enormous number of pages. It is not denied by Mr. Whiteley that the questions relating to Bywaters were fully and clearly put to the jury by the learned judge. They were, in fact, put again and again; and in the opinion of this Court in the subsidiary matters to which Mr. Whiteley has taken exception there is no ground whatever for any complaint of misdirection. With the complaint that evidence was wrongly admitted I have dealt in dealing with the letters, but I make this further observation. It matters not for this purpose whether Mrs. Thompson had really done or attempted the various acts which in those letters she said or suggested she had done or attempted. It matters not whether the letters went to show that there was between this appellant and Mrs. Thompson another agreement tending to the same end. Those letters were material as throwing light not only upon the question by whom was this deed done, but upon what was the effect, the purpose, with which it was done. Therefore, not to mention other grounds, those letters were most material upon the allegation of Bywaters, by way of afterthought, that what he did was done in self-defence. I say "by way of afterthought" because when one looks at the statement which Bywaters made at an early date after his arrest, he said "the reason I fought with Thompson was because he never acted like a man to his wife; he always seemed several degrees lower than a snake." That was not saying that he fought Thompson in self-defence; it excluded that defence. In all these circumstances in the opinion of the Court this appeal fails upon every ground, and must be dismissed.

Appeal dismissed.

H. C.

Solicitor for Appellant—*J. Barrington Matthews.*

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On a trial for murder by violence, evidence that defendant conspired to murder the deceased by other means is admissible.
See last headnote.

See p. 66, above.

Sir Henry Curtis Bennett, K.C. (with him *Frampton* and *Ivan Snell*), for the appellant, who was not present. I submit that in the indictment *for murder* appellant's letters to Bywaters were not evidence against her, though they were on the second indictment (p. 67, above). He cited *Makin* v. *The Attorney-General of New South Wales*, 1894, A. C. 57; 17 Cox, C. C. 704; 58 J. P. 148; 63 L. J. P. C. 41; *Bond*, 1906, 2 K. B. 389; 75 L. J. K. B. 693; 21 Cox, C. C. 252; C. C. R.; *Armstrong*, 1922, 2 K. B. 555; 38 T. L. R. 631; 66 S. J. 540; 127 L. T. 221; 16 Cr. App. R. 149. The letters could only be put in to show that she was a likely person to murder her husband. Yet when the body was exhumed there was not a trace of poison. In fact, all her talk about poison was mere melodrama.

[The Lord Chief Justice: So far as the persuasive effect of incitement was in issue, it depended not upon the question whether the statements were true, but upon the question what they were intended and likely to cause the reader to believe.]

That is met by the second indictment, and Bywaters swore that the letters did not incite him. Surely it must affect the jury seriously to know whether what she wrote was true or untrue.

[The Lord Chief Justice: If the jury, after hearing all the evidence, believed that what she wrote about other attempts which had failed, and the necessity in her view of making a different attack which should not fail, was true, the argument is obviously *a fortiori*.]

Other evidence showed that she recited incidents which never happened. Then, if there ever was a common design to murder, did it last till October 3rd? That is an essential point: the correspon-

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dence showed that if there was ever such a design it had been abandoned by then. Nor could she aid or abet Bywaters, for the evidence showed that she had no idea that he would make an attack that night or even that he was in the neighbourhood of Ilford, and that she was completely taken by surprise. It is true that she told several lies about Bywaters, but she was concealing the identity of her lover. In summing up the learned judge did not warn the jury that they could not on this indictment convict appellant on the letters, disgraceful as they were. Counsel cited *Fretwell,* L. & C. 161; 31 L. J. M. C. 145; 9 Cox, C. C. 152; C. C. R. 1862: c. q. (following *Russell's* case, 1 Moo. C. C. 356: 1832: c. q.); *Lomas,* 23 Cox, C. C. 765; 78 J. P. 152; 30 T. L. R. 125; 9 Cr. App. R. 220: 1913: c. q. [The LORD CHIEF JUSTICE: That is not a case of general application.] *Badash,* 13 Cr. App. R. 917: 1917: c. q.

The Solicitor-General (with him *Travers Humphreys* and *R. Oliver*) was not called on.

The LORD CHIEF JUSTICE: The charge against Mrs. Thompson is in point of law that she was a principal in the second degree, that is, a person present at the commission of the offence who aided and abetted the commission of the offence. In other words, the point of the charge against Mrs. Thompson is that she incited, aided, and abetted the commission of the murder of her husband, and was present when it was perpetrated.

Before dealing with the arguments it is necessary to review some of the facts in what is essentially a commonplace and unedifying case.

His Lordship then dealt with the facts, mentioning that for some months Bywaters and Mrs. Thompson had been on terms of culpable intimacy.

While Bywaters was away a remarkable and deplorable correspondence passed between them, which was full of the most mischievous and perilous stuff. In the opinion of this Court there is more than one ground on which the use of the letters which had passed between Mrs. Thompson and Bywaters could be justified. It is enough for the present purpose to say that they could be justified on the ground that, by means of them, the prosecution sought to show that continuously over

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a long period, beginning months before and culminating at the time immediately antecedent to the commission of the crime, Mrs. Thompson was, with every sort of ingenuity, by precept and by example, actual or simulated, endeavouring to incite Bywaters to the commission of the crime. The letters went on to the last day, and her letter on the day of the crime contained what the jury might well regard as a calculated incitement to kill her husband that night.

The letters showed a passionate and wicked affection between Mrs. Thompson and Bywaters. They contained what purported to be accounts of efforts which had been made, sometimes without the assistance of Bywaters and sometimes with his assistance, to get Mr. Thompson out of the way. Lastly, there was a continual entreaty and hope that that which they both desired would be accomplished. More than that, the facts were such as might convince the jury that Mrs. Thompson brought her husband to that place at that time to be killed in that way.

In the opinion of this Court, the theory that those letters, so far as they purported to describe attempts made on the life of Mr. Thompson, were mere "vapour," as Bywaters had called them, or "melodramatic nonsense," to use the words of counsel, cannot be accepted. But if the question is whether the letters were evidence of a continuous and protracted incitement to Bywaters to commit the crime which in the end he committed it is of little importance whether Mrs. Thompson was truly reporting something which she had done or falsely reporting something which she merely pretended she had done. In her last letter Mrs. Thompson said:—

"Do something to-morrow night. . . . I will still risk and try if you will."

In the opinion of this Court, the letters were properly admitted as evidence. There were abundant materials upon which the jury might find, as they had found, that there was a common design to murder, and that it continued up to the moment of the committing of the act, or in other words, that the community of purpose extended to the time of the commission of the felony.

At the very outset of the summing-up, Mr. Justice Shearman had put the question to the jury in a clear and simple form when he said that it was whether the two persons by arrangement with each other had agreed to murder Thompson, and told the jury that, unless they were satisfied that it was by arrangement. there would

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be no case against Mrs. Thompson. In view of the evidence of what had happened before the crime and immediately afterwards, it was obviously open to the jury to infer that what had been done was then and there done as the result of preconcerted arrangement. To take the long summing-up as a whole, it was impossible to found on it any unfavourable criticism. The case was clearly put before the jury. There was ample evidence, partly direct, partly evidence from which inference might properly be drawn, and on that evidence, in a case which exhibited, from the beginning to the end, no redeeming feature, the jury had convicted Mrs. Thompson. There is no reason to interfere with the conviction, and the appeal is therefore dismissed.

Appeal dismissed.

H. C.

Solicitors for the Appellant—*Messrs. Sterns.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE SALTER.

KARL HARRY FINEGOLD.

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15 *January.*

When buying at an undervalue is charged as aiding and abetting a bankruptcy offence, evidence of a previous purchase by the accused at an undervalue is admissible against him.

Application for leave to appeal against conviction and sentence.

Applicant was convicted at the Leeds Assizes, on 7th December, 1922, before Greer, J., of aiding and abetting bankruptcy offences, and was sentenced to nine months' imprisonment. One Pollard pleaded guilty to offences contrary to sub-ss. 14 and 15 of s. 154 (*a*) of the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), and applicant was convicted of aiding and abetting him.

The bankrupt Pollard came to applicant on several occasions and asked him what prices he would give him for certain cloth.

(*a*) S. 154. Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made shall in each of the cases following be guilty of a misdemeanour:—

(14) If, within six months next before the presentation of a bankruptcy petition by or against him, or, in the case of a receiving order made under section 107 of this Act, before the date of the order, or after the presentation of a bankruptcy petition and before the making of a receiving order he obtains under the false pretence of carrying on business, and, if a trader, of dealing in the ordinary way of his trade, any property on credit and has not paid for the same, unless he proves that he had no intent to defraud.

(15) If, within six months next before the presentation of a bankruptcy petition by or against him, or, in the case of a receiving order made under section 107 of this Act before the date of the order, or after the presentation of a bankruptcy petition and before the making of a receiving order, he pawns, pledges, or disposes of any property which he has obtained on credit and has not paid for, unless, in the case of a trader, such pawning, pledging, or disposing is in the ordinary way of his trade, and unless in any case he proves that he had no intent to defraud.

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Pollard then obtained the cloth on credit from manufacturers at a considerably higher price than applicant offered and paid him. At the trial the learned judge allowed evidence to be given that in May, 1920, applicant bought from Pollard cloth valued £1,800 for £400. At that time Pollard was acting as agent for one Parkin, who had obtained the cloth from Messrs. Longfield & Co., of which firm a Mr. Swaine was a partner. Parkin and Swaine at that time interviewed applicant on the matter and complained of his conduct.

The Court refused leave for counsel to argue on the question of the indictment as it was not raised in the notice of appeal.

C. Whiteley, K.C. (*A. S. Diamond* with him), for the applicant, who was not present. The evidence of a transaction which took place some sixteen months before those in issue ought not to have been given. That was quite a different transaction and not evidence in this case at all.

[SHEARMAN J.: It shows his intention of buying at an undervalue.]

Because a complaint was made to applicant in 1920 that Pollard acting as agent had sold to him at a low price it does not become evidence to show that because Pollard is now selling to him at a low price his own goods he knew Pollard was defrauding his creditors. There must be a *nexus* between the transactions. *Boyle and Merchant*, 1914, 3 K. B. 339; 83 L. J. K. B. 1801; 111 L. T. R. 638; 78 J. P. 390; 58 S. J. 673; 30 T. L. R. 521; 24 Cox, C. C. 406; 10 Cr. App. R. 180.

SALTER J.: The applicant was convicted of aiding and abetting a man named Pollard in committing offences against sub-ss. 14 and 15 of s. 154 of the Bankruptcy Act, 1914. Pollard pleaded guilty and was called as a witness for the prosecution.

There were past events which occurred in May, 1920, and in which four persons, Parkin, Swaine, Pollard and the applicant, were concerned, and the question arises whether the learned judge rightly admitted evidence of those past events.

At that time Pollard was selling on commission for Parkin cloth which the latter had obtained from Swaine, and Pollard sold

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KARL HARRY FINEGOLD.

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cloth valued at £1,800 to the applicant for £400. Swaine and Parkin went to see the applicant, taking Pollard with them, and in substance pointed out that from the low price applicant must have known he was taking part in what was a fraudulent transaction. In the opinion of this Court the evidence was rightly admitted, and there was amply sufficient *nexus* between this transaction and those in the indictment. It was admissible to show the nature of the transactions, forming the subject of the indictment, in which the applicant took part, which took place in November, 1921, and March, 1922.

Application dismissed.

J. N. F.

Solicitors for Applicant—*Gisborne, Woodhouse & Co.*, Agents for *Carr & Sandelson*, Leeds.

PERCY WILLIAM ADAMS.

A statement made in the presence of an accused person, even upon an occasion which might be expected reasonably to call for some explanation or denial from him, is not evidence against him of the allegations contained in the statement, but may be proved only with reference to his conduct and demeanour upon hearing it. It is a misdirection to treat such a statement as in itself evidence of the facts therein stated.

Appeal against conviction on law.

The appellant was convicted at the Birmingham City Assizes, on 6th December, 1922, before Mr. Commissioner Shortt, of gross indecency with a male person, and sentenced to twelve months' imprisonment with hard labour.

Norman Birkett for the appellant, who was not present. The grounds of appeal are misdirection and non-direction. A boy named Hodgson, who was charged with appellant, made a statement at the police station in the presence of appellant, who had previously said twice that he knew nothing about the offence.

The contents of that statement were used as evidence against appellant, and the jury was not warned of the limited way in which that statement could be used as evidence.

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[The LORD CHIEF JUSTICE: Your point is that the statement could be used only in regard to what appellant did or omitted to do when he was made aware of it, and that its contents could not be used as evidence against appellant in the sense that the statement was proof of their truth?]

Yes (He was stopped by the Court.)

Maurice Healy for the Crown. Appellant had raised the issue of its being a case of blackmail: the statement was therefore admissible as he did not raise that question at the time.

[The LORD CHIEF JUSTICE: Can you show anywhere in the summing-up any passage in which the learned Commissioner warned the jury that the statement was not evidence of the truth of its contents, but of importance only with reference to the demeanour of the appellant at the time it was made?]

No. There was, apart from the statement, overwhelming evidence against appellant.

The LORD CHIEF JUSTICE: In this case the appellant was convicted of gross indecency with a male person. A boy named Hodgson was indicted with appellant and pleaded guilty. On Sunday, 27th August, two police constables in plain clothes saw or believed that they saw two persons behaving indecently. They afterwards arrested the boy, and later the appellant. At the police station the boy said that he wished to make a statement, and the boy in the appellant's presence made a statement which was written down. The appellant at that moment said nothing. But he had just previously denied, as he afterwards denied, the truth of the charge. Stress has been laid by learned counsel for the appellant upon the fact that not only was no warning given to the jury to explain the exceedingly limited way in which that statement of the boy could be admitted as evidence, but that in more than one passage it was treated as though it were evidence of the boy Hodgson given at the trial.

That statement was admissible as evidence with reference to the demeanour of appellant at the time when he heard it; it was

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not admissible to prove the truth of what was contained in the statement itself.

Christie, 1914, A. C. 545; 83 L. J. K. B. 1097; 111 L. T. R. 220; 78 J. P. 321; 24 Cox, C. C. 249; 58 S. J. 515; 30 T. L. R 471; 10 Cr. App. R. 141: c. q.; *Norton*, 1910, 2 K. B. 496; 79 L. J. K. B. 756; 102 L. T. R. 926; 74 J. P. 375; 54 S. J. 602; 5 Cr. App. R. 65: c. q.

In this case, not once nor twice, but again and again, this statement was treated as though it were evidence of the truth of its contents and it is nowhere possible to find any warning given to show the precise reasons for which, or the precise limits within which the statement was admitted.

In these circumstances this Court must allow this appeal, as it cannot say that if there had been no irregularity the jury must inevitably have come to the same conclusion.

Conviction quashed.

J. N. F.

Solicitors for the Appellant—*J. Hall-Wright*, Birmingham; for Respondent—*Wilfrid Day*, Birmingham.

ROY MACLEAN.

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Mere omission to deal with a point of evidence is not necessarily misdirection. The Court will not retry the facts of a case.

Application for leave to appeal against conviction (refused by Bray J.).

Applicant, who was not present, was convicted on January 2nd, 1923, at the West Riding (Leeds) Sessions, of housebreaking and an assault on the police, and was sentenced by the Deputy-Chairman to three years' penal servitude and six months' imprisonment with hard labour (concurrent). Only one point in the case calls for report.

R. F. Burnand for the applicant (under s. 10 of the Criminal Appeal Act). The defence was an *alibi*, and if the jury

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believed two perfectly respectable witnesses of the four called to prove the *alibi* for the applicant, it was physically impossible that applicant was at the scene of the crime at the material time: yet it was said in the summing-up that the evidence of this lady and this gentleman was not relevant.

In reply to the Court, counsel admitted that the jury were aware of this evidence, and that he had fully commented on it.

SALTER J.: The mere omission to deal with this evidence did not amount to misdirection; the jury had heard it and must have been alive to it. This, like so many cases in this Court, is an attempt to retry the facts, and this the Court will not do.

Application dismissed.

H. C.

Solicitor for Applicant—*Burnett,* Leeds.

HENRY HEATHFIELD.

When two persons are tried together and the evidence discloses a possibility that one of them may be an accomplice of the other or of a third person, the usual warning to the jury about corroboration must be given.

Appellant was convicted at the Cardiff City Sessions on January 5th, 1923, with his brother Frederick, of burglary and larceny, on December 19th, 1922, of watches, &c. to the value of £30, and of receiving the same with guilty knowledge (one indictment), and was sentenced by the Recorder to three years' penal servitude.

The evidence for the prosecution was that a jeweller's shop in City Road, Cardiff, was broken into some time between 9 p.m. December 19th, and 8.30 a.m. on December 20th, and goods consisting of watches, &c. to the value of £30 taken. On the 23rd December the police searched the premises in which the appellant lived with his brother and two sisters, and found in the kitchen an Ingersoll watch, a Waterbury watch in Frederick Heathfield's waistcoat in a bedroom shared by the brothers, and an ivorine watch case on a table near the bed in the same room. None of the above were identified as part of the stolen property, but were

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stated to be similar. Later in the day Frederick, when questioned by the police with regard to the watch which had been found in his waistcoat, said: "Harry must have put it there." Upon being searched a cigarette case, identified as part of the stolen property, was found upon him, whereupon he volunteered the statement, "Harry gave me that cigarette case for a Christmas box a few days ago." The appellant was not present at the time the above statements were made. At the close of the case for the prosecution, counsel for the appellant submitted that there was no evidence to go to the jury with respect to either charge. The Recorder ruled that there was evidence for the jury. Frederick Heathfield went into the box, and in the course of his evidence repeated the accusation which he had made to the police regarding the appellant. Appellant, Henry Heathfield, gave evidence denying that he had given the cigarette case to his brother, or that he had placed the watch in his brother's waistcoat. He was cross-examined by Frederick's counsel.

Joshua Davies for the appellant (under s. 10 of the Criminal Appeal Act), who was not present. The Recorder was wrong in refusing to withdraw the case from the jury. There was no evidence to connect appellant with the burglary; he had not been heard or seen near the shop. The goods found in the house had not been proved to be in his possession or under his control. *Berger,* 34 L. J. K. B. 541; 31 T. L. R. 159; 11 Cr. App. R. 72: 1915: c. q. In *J. Power,* 1919, 1 K. B. 572; 120 L. T. 577; 88 L. J. K. B. 593; 83 J. P. 124; 35 T. L. R. 283; 14 Cr. App. R. 17: c. q. (five judges), however, it was laid down that this Court would not quash a conviction though there was no evidence at the end of the case for the prosecution if such evidence was supplied by the defence. A dictum of Darling J. in *Hogan,* 16 Cr. App. R. 182: 1922, may be construed as not being in accord with the rule in *Power*. At the close of the case for the defence there was no further evidence against appellant except the statements made by his brother, the truth of which appellant denied. The Recorder did not tell the jury that the statements made by Frederick to the police in appellant's absence were not evidence against appellant, nor did he distinguish between the two counts in the indictment. There was no direction to the jury on what amounts to possession of stolen property: *Berger*. Joint pos-

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session cannot be presumed; the jury ought to have been asked definitely whether the articles were in appellant's exclusive possession, joint possession, or at all: *Flatman,* 8 Cr. App. R. 256: 1913: c. q. Finally, there was not a word of warning given that Frederick's evidence was that of an accomplice, and should therefore be corroborated: *Baskerville,* 1916, 2 K. B. 658; 86 L. J. K. B. 28; 25 Cox, C. C. 524; 80 J. P. 446; 60 S. J. 696; 12 Cr App. R. 81 (five judges).

[SALTER J.: The learned Recorder, when summing up, did not know whether the brother was an accomplice or not; it depended on the jury's finding. The best course would have been to decide the brother's case first.]

Thorpe, for the Crown, could not defend the procedure adopted. The brother was speaking in his own defence, therefore you could not keep out his attack on his brother.

[The LORD CHIEF JUSTICE: But if it was his case to inculpate someone else, that might be a reason for a separate trial.]

This appellant denied that he gave anything to his brother.

The LORD CHIEF JUSTICE: Four points may be remarked in this case: (1) At the end of the prosecution's case there was no evidence against the appellant. (2) At the end of the whole case the only evidence against him was his brother's; the evidence, therefore, was untrustworthy. (3) It was apparent that if the jury were going to convict this man the brother was an accomplice; even if they disbelieved this appellant, still his brother might be an accomplice of the thief. (4) The brother's statement on arrest was admitted against this appellant though he was not present when it was made.

This conviction must be quashed.

Conviction quashed.

H. C.

HARRY SHAW.

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Severity of sentence.

Appellant was convicted at the Leicestershire Sessions on January 2nd, 1923, of assault occasioning actual bodily harm to a schoolmistress on November 16th, 1922 (having been acquitted on counts for an intent to steal and ravish), and was sentenced by the Chairman to five years' penal servitude. He had been previously convicted of the offence of breaking into a house (in order to get a night's lodging, according to his account), and of a burglary. He appealed against sentence.

Appellant in person. "The Recorder went very deeply into one of my cases, and it seemed as if he was trying my case over again."

The Lord Chief Justice: This man seems to have been drinking on this occasion, and it is possible that his statement that he only wanted to sleep in the house—he was actually arrested when he was sleeping in a spare bedroom in the house—is true, and there was no serious injury to the lady and no doctor called in. In these circumstances the sentence will be reduced to one of eighteen months' imprisonment with hard labour.

Sentence reduced.

H. C.

PARKER GREENWOOD.

Severity of sentence in view of triviality of offence.

Appeal against sentence.

Appellant was convicted on January 1st, 1923, at the West Riding (Leeds) Sessions, of shopbreaking, and was sentenced by the Deputy-Chairman to five years' penal servitude. He had had three terms of penal servitude (one of ten years) for stack-firing,

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and had only recently been released, and there were other convictions for thefts, &c., extending over a long period. In this case he broke into a little shop in a hamlet about 11 p.m., and took a few pots of tinned food; he was caught immediately by a policeman, and at once confessed. He had often been in asylums, but the prison doctor thought that he was sane but a clever malingerer.

Appellant in person.

A. S. Matthews for the Crown.

The Court reduced the sentence to nine months' imprisonment with hard labour.

Sentence reduced.

H. C.

DANIEL FLYNN AND CHARLES WHITE.

Sentence mitigated in view of a considerable period of honest life.

Appeals against sentence.

Appellants, who were present, were sentenced by the Recorder, on January 9th, 1923, at the Bristol City Sessions, for housebreaking on November 4th, 1922, to five years' penal servitude.

Both were men of very bad character, but they had been at liberty for four or five years without any conviction. The Court reduced the term in each case to three years.

Sentences reduced.

H. C.

GEORGE MANNING.

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Where irregularities in procedure of a trial are such as to embarrass the defence, the conviction may be quashed.

Appeal against conviction.

Appellant was convicted on January 6th, 1923, at the Middlesex Sessions, of housebreaking on November 9th, 1922, larceny, and receiving a watch and chain, a match-box, &c. with guilty knowledge (one indictment), and was sentenced by the learned Chairman to nine months' imprisonment with hard labour.

O'Malley for the appellant, who was present. Appellant had been charged at the police court with housebreaking on November 9th. The two witnesses at the police court who spoke to the date fixed it as November 9th. One of them said that the housebreaking took place on a Thursday. In fact November 9th was a Thursday. The indictment put November 9th as the date of the offence. Appellant came to trial prepared with an *alibi*, supported by two witnesses, for November 9th. That date happened to be Lord Mayor's day, and the witnesses fixed the day by events referable to the procession. At the trial, before opening the case, counsel for the prosecution requested leave from the Chairman to amend the date of the offence alleged in the indictment from November 9th to November 8th. The Chairman said that he would deal with the amendment later on. No amendment was in fact made. The consent of appellant to the proposed amendment was never obtained. During the course of the trial the two witnesses who at the police court gave the date of the housebreaking as November 9th, swore that the date was Wednesday, November 8th. At the close of the prosecution appellant in his opening speech to the jury said that he could prove an *alibi* both for November 9th and November 8th. He gave evidence on his own behalf, but was so confused by the change of date that in fact he never said a word where he was on November 8th at the time given for the housebreaking—between 4 p.m. and 10 p.m. He called his mother to prove a receipt for one of the articles alleged to have been stolen or received by him. His mother began to speak of November 9th, and when her attention was directed to Wednesday, November 8th, at once, without any prompting, said that appellant

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and his young lady were with her from 6 p.m. to 10 p.m. She fixed the date because on Wednesday appellant's young lady used to come and see appellant. After his mother left the box appellant mentioned to the learned Chairman that the two witnesses who were to prove an *alibi* for November 9th were unnecessary, but his young lady, Miss Taylor, could prove an *alibi* for him for November 8th. The Chairman asked him why he had not brought Miss Taylor. Appellant said that she was not there because he had been charged with an offence for November 9th. The Chairman then asked whether he had "anything more to say in this case which has been weighted with many immaterial matters." Appellant referred to letters from Miss Taylor which would show that she had been with him on Wednesday, November 8th. The Chairman said that the letters were not admissible, but "I will put it to the jury as if she were here." In fact Miss Taylor was not called, and the Chairman summed up. In his summing-up he pointed out that the housebreaking took place between 4 p.m. and 10 p.m., and that appellant's mother had only spoken to the time from 6 p.m. to 10 p.m. of November 8th. He said that he was sorry that Miss Taylor had not been called, but asked how, assuming that she had been called and had said ditto to the mother, it would have assisted the case against the prosecutor's evidence.

Had appellant been given the opportunity of calling Miss Taylor it was impossible to say that the jury "must certainly" have convicted him either of housebreaking or of receiving. Had they on the evidence of Miss Taylor acquitted him of housebreaking they would have approached his story of the mode in which the stolen goods had come into his possession in a different spirit. If appellant were proved to be right in the one story on the one charge, they might well have believed the other story on the other charge. Further, there were other irregularities which must have influenced the jury. Evidence was given to show that on November 25th and 27th, more than two weeks after the housebreaking, there were found fifty skeleton keys, some on the prisoner, others on the premises where he lived. There was nothing to connect these keys with the housebreaking. The evidence was that the entry to the house and the opening of a cabinet were effected by a jemmy found on the prisoner, and not by keys. Further, a large amount of valuable property was exhibited in Court as having

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been found at the house where the prisoner lived, and such property had been in no way identified as stolen property. In addition, the prisoner's story that a bookmaker's clerk had asked him to look after the stolen property and certain burglarious tools was never presented to the jury in a reasoned way, but was dismissed as "that fairy tale about a bookmaker asking him to look after them." The verdict was a general one.

[SALTER J.: The gist of this case is the watch and chain, not the tools. The watch was never identified.

SHEARMAN J.: The learned Chairman treated it as identified; the owner can hardly be mistaken about this watch (produced) with its inscription.]

[*St J. Dawson* for the Crown. At the trial the jury had the watch in their hands, and the learned Chairman pointed out the inscription "Elgin" to them.]

Defendant was undefended.

[SHEARMAN J.: There was no receipt for the match-box. I doubt whether the skeleton keys were evidence at all.

The LORD CHIEF JUSTICE: In fact a great array of unidentified articles was produced from appellant's house in evidence. The question is—was there "a miscarriage of justice?"]

Sir R. Muir (with him *St. J. Dawson*) for the Crown. If the trial was satisfactory there was abundant evidence for a conviction. At the police court every witness, without exception, spoke of Thursday the 9th as the day. In the course of the case counsel (*Dawson*) asked leave to amend to the 8th, but the judge said that he would see as the case proceeded.

[The LORD CHIEF JUSTICE: If the indictment had been amended appellant might have asked for an opportunity to consider his position.]

Technically it may be doubted whether now a date can be

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amended; before the Indictments Act the date was immaterial, therefore, can it be amended?

[SALTER J.: Rule 9 under that Act speaks of a "defective" indictment.]

"Time" is there mentioned, but not "date."

I cannot deny that there were many irregularities in this case, and I cannot contend that the jury otherwise "would certainly" or "must inevitably" have convicted. If the watch was certainly identified, then the case against appellant was very strong, for the watch, chain and match-box mentioned were found in his possession on November 25th, and it is highly improbable that this was an exactly similar set of things to those which had been worn by the prosecutor for twelve years. His story was that a fellow bookmaker's tout sold the lot to him for £3, which appellant borrowed from his mother, taking a receipt on the 7th November (produced below). The learned Chairman was justified in calling this "a fairy tale." On the other hand, this man, who was undefended, was never allowed to get his case out. His statement that he had a perfect *alibi* for the 9th of November ought to have been turned into a question, to put which he ought to have been assisted by the Court; there was no one else to help him. He was baulked at every stage. Then he was questioned by the police while he was in custody about the skeleton keys without a word of caution—a very grave matter for him. The summing-up made much of the "burglar's outfit." The jemmy was, of course, good evidence in this case.

[The LORD CHIEF JUSTICE referred to *A. Thompson*, 1918, A. C. 221; 87 L. J. K. B. 478; 82 J. P. 145; 34 T. L. R. 214; 13 Cr. App. R. 61; 12 Cr. App. R. 261.

SHEARMAN J.: It depends on the case made; if the entry was by keys the jemmy would not be evidence, and *vice versâ*.]

The LORD CHIEF JUSTICE: The alteration of the date alleged in the indictment without any formal amendment, with the result that the offence actually tried was of a date not alleged, was a

serious embarrassment to the accused. Moreover, as the Crown admitted. there were other irregularities in the procedure—so many and of such a kind that the appeal must be allowed.

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Conviction quashed.

H. C.

Solicitors for Appellant—*Messrs. Taunton & Co.*

THOMAS MANSFIELD MIDDLETON.

12 *February.*

To support a conviction for receiving with guilty knowledge, possession must be strictly proved.

Appeal against conviction and sentence, by leave of the Court.

Appellant was convicted, at the East Kent Sessions, on 2nd January, 1923, before the Chairman, of receiving stolen property, and was sentenced to three years' detention in a Borstal institution.

The appellant, with an elder brother Alfred, and a younger brother Charles, was in a boat, of which Alfred was owner and master, in Rainham creek. The boat went ashore, and, after being without food for two days, the two younger brothers went ashore to look for mussels, and the eldest brother went on board a boat named the "Elsie" and stole from that vessel some articles of food and some candles. Appellant, on his return on board, ate some of the food. The owner of the "Elsie" reported the theft to the police, who came on board the boat to which appellant belonged, and there found certain articles of food and candles concealed in a compartment in the vessel. When the police came on board appellant said he knew nothing about the theft from the "Elsie," and when the articles were discovered he said that his younger brother Charles knew nothing about them.

A. H. King for the appellant (under s. 10 of the Criminal Appeal Act), who was present. I submit that he was never in possession or control of the property which he was charged with receiving.

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[The LORD CHIEF JUSTICE: Did the indictment refer only to the articles which were found, or did it include the food which appellant ate?]

I am not certain, but I suggest it only referred to the articles found. It was admitted that Alfred was the owner of the boat.

J. W. Morris for the Crown.

The LORD CHIEF JUSTICE, after reciting the facts: It is by no means clear that the indictment has any relation to that part of of the food which was consumed by appellant, and even if it had it is difficult to suppose that if it had been understood that appellant was charged only with receiving the food he had eaten he would have been prosecuted, or if prosecuted, that he would have been convicted.

The indictment appears to this Court to refer to the articles found concealed in the boat, and it does not appear that the appellant had such possession and control of them as would justify a conviction of receiving. In these circumstances the verdict is unsatisfactory and the appeal must be allowed.

Conviction quashed.

J. N. F.

GEORGE CLARKE.

Observations on sentence on habitual criminals.

Appeal against sentence.

Appellant was convicted, at the Leeds City Sessions, on 9th January, 1923, before the Recorder, of warehouse breaking and larceny, and of being a habitual criminal, and was sentenced to three years' penal servitude and seven years' preventive detention.

Appellant in person.

R. Sykes for the Crown.

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[The LORD CHIEF JUSTICE: Was the attention of the learned Recorder directed to the fact that though a man is convicted of being a habitual criminal, it is not necessary always to pass sentence of preventive detention?]

I cannot recollect.

The LORD CHIEF JUSTICE: In this case the appellant pleaded guilty to an indictment charging him with warehouse breaking and larceny, and was afterwards convicted by a jury of being a habitual criminal.

The appellant's record is a long and bad one, and his conviction as a habitual criminal rests on a previous conviction in 1910 of being a habitual criminal. The law relating to habitual criminals is not quite what it is sometimes supposed to be.

By s. 10, sub-s. (2), of the Prevention of Crime Act, 1908, 8 Edw. 7, c. 59, "a person shall not be found to be a habitual criminal unless the jury finds on evidence—(a) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the said indictment been convicted of a crime, whether any such previous conviction was before or after the passing of this Act, and that he is leading persistently a dishonest or criminal life; or (b) that he has on such a previous conviction been found to be a habitual criminal and sentenced to preventive detention."

In this case the notice of the grounds on which the charge was made appears to cover both (a) and (b). However that may be, the case put to the jury was that upon a previous date the accused was convicted of being a habitual criminal and sentenced to preventive detention. It is undoubtedly the law that where a person has been convicted of being a habitual criminal and has been sentenced to preventive detention, proof of those facts is sufficient to ground another conviction as a habitual criminal, but it by no means follows that because convicted he must necessarily be sentenced to penal servitude and preventive detention. *G. Stanley*, 1920, 2 K. B. 235; 89 L. J. K. B. 452; 123 L. T. 271; 84 J. P. 119; 64 S. J. 341; 36 T. L. R. 328; 26 Cox, C. C. 611; 14 Cr. App. R. 141 (preventive detention remitted); *G. Vincent*, 15 Cr. App. R. 19: 1920 (preventive detention remitted).

In this case there was uncontradicted evidence to show that,

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bad as the previous record of the appellant was, he had from January to October, 1922, endeavoured to lead an honest life. Another observation which must be made is that before a sentence of preventive detention is passed, it is a condition precedent that the person should be sentenced to penal servitude for the offence charged in the indictment. But it is not a good reason for passing a sentence of three years' penal servitude that it is a necessary preliminary to a sentence of preventive detention.

Looking at all the facts of the case, that appellant from January to October endeavoured to lead an honest life, and that what led him to commit the offences charged appears to have been the temptation put in his way by one Karasafski, who was convicted with him, the Court is of opinion that justice would be done by quashing the sentence of preventive detention and reducing the sentence of three years' penal servitude to one of eighteen months' imprisonment with hard labour, similar.

Primary sentence reduced; preventive detention remitted.

J. N. F.

WILLIAM JOHNSTON GRAHAM.

Where it is essential to prove guilty knowledge, it may not be possible to obtain sufficient certainty from uncertain and ambiguous evidence of such knowledge, though such evidence may be relevant to some part of the case.

Appeal against conviction and sentence.

Appellant was convicted, at the Central Criminal Court, on 12th January, 1923, before the Commissioner, of conspiracy to obtain goods by false pretences and of obtaining goods by false pretences, and was sentenced to six months' imprisonment in the second division.

Appellant was employed as a clerk by a firm of solicitors named Davidson & Co., and one Major had also been taken into their employment at the suggestion of appellant. Appellant and Major were convicted of obtaining wines and spirits by falsely pretending that they had the authority of Mr. Davidson to pledge his credit and that he was acting as an agent for a catering firm on the South Coast; and of conspiracy to obtain the same by means of the said false pretences.

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E. J. Purchase, K.C., for the appellant, who was present. There was not, it is submitted, sufficient evidence to convict appellant. The whole case for the prosecution as against the appellant rested upon an alleged false pretence made by Major to Peter Stoeri in the presence and hearing of the appellant, the false pretence being in effect that Davidson's were the purchasers and responsible for the payments in respect of large quantities of wines and spirits. The transactions were carried out by Major, and the only evidence that appellant knew of the false pretences was that of one Mr. Peter Stoeri, who stated that appellant was present on one occasion, on 8th September, when he had an interview with Major, at which the false statements were made. Mr. Stoeri was very uncertain in his recollection, and gave different evidence at the police court. The learned judge, in his summing-up, said that if the case rested on that alone, he would have withdrawn it from the jury. Evidence was also given against appellant that he gave Major cheques, and that he went with Major in the van which delivered the wines and spirits at certain public-houses, and also that he stored some of the wine at his flat, but it is submitted that such evidence does not help to confirm Mr. Stoeri's statement.

[SHEARMAN J.: Your point is that the fact that appellant was giving the cheques and driving round with the van might be evidence that he was concerned in the speculation in the wines, but it is no evidence to confirm the view that he was cognisant of the false pretences made by Major or present when they were made?]

Yes.

J. A. C. Keeves for the Crown. The jury, looking at the subsequent evidence, were entitled to consider from that whether they would accept Mr. Stoeri's evidence.

[The LORD CHIEF JUSTICE: You have to prove two things, viz., that appellant did certain acts and did them with guilty knowledge. Your evidence of the first is weak, and you produce evidence to confirm it which is consistent with guilt or innocence. The subsequent acts really only show that appellant knew that Major had got the liquor, but not that he knew it was obtained by fraud.]

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Hewart L.C.J.

It was a matter for the jury to say whether, in view of those acts, they accepted the evidence of Mr. Peter Stoeri.

The LORD CHIEF JUSTICE, after reciting the facts: There was evidence that appellant was present at one interview with Major only; that was the evidence of a Mr. Peter Stoeri, and his evidence is open to this objection, not that it was not perfectly honest, but that he was not very certain in his recollection, and the learned judge in his summing-up said that if the case against the appellant rested only on that evidence he would have withdrawn the case from the jury. But in the course of the case it was urged by the prosecution, and accepted by the learned judge doubtfully, that Mr. Stoeri's evidence was reinforced by the fact that appellant gave Major cheques which he had not money to meet, and to meet which Major was to pay money into appellant's bank, so that they might be honoured, and further, that when it came to the act of delivering the liquor, both Major and the appellant went in a motor van to two public-houses, where, however, Major transacted the business while appellant remained in the bar.

The question is, did such behaviour, however eccentric it may have been on the part of a man occupying the position of a young solicitor or one about to be admitted as a solicitor, and however suspicious it may be, afford any confirmation of the evidence of Mr. Stoeri that appellant was present on one occasion when the prisoner Major made the false statements? It must be admitted that the later acts were of an ambiguous character; they were evidence that appellant knew that Major had got the liquor, but can one from acts of such ambiguity disengage an ingredient which will confirm the vital evidence of Mr. Stoeri? Can one get rid of the uncertainty of that evidence by looking at something of an ambiguous character which happened later? This Court is of opinion that one cannot, and that as all the evidence against the appellant is that uncertain evidence about the interview on the 8th September, the conviction is unsatisfactory and the appeal must be allowed.

Conviction quashed.

J. N. F.

Solicitor for the Appellant—*Harry Wilson.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY, AND MR. JUSTICE SALTER.

HENRY HORATIO SPINNEY.

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Where larceny by a trick is alleged, the jury should be directed on the question whether there was an intention to pass the property, or merely to part with possession.

Appeal against conviction and sentence.

Appellant was convicted, at the Middlesex Sessions, on 3rd February, 1923, before the Deputy-Chairman, of the larceny of a motor-car, and was sentenced to eighteen months' imprisonment with hard labour. The appellant went with one Rigby to a Mr. Thompson on 16th December, 1922, and Rigby purchased, subject to a week's trial, a motor-car, giving a post-dated cheque for £50 in payment, the receipt of which Thompson acknowledged in a letter, though he refused to give a stamped receipt until the cheque had been met, although appellant asked him to stamp the letter. Appellant took an active part in the transaction, and it was stated that the car was required for carrying round confectionery. On 18th December the car was sold to one Pass for £57. A letter was then sent to Thompson asking him to hold back the cheque, but on 20th December Thompson discovered the sale to Pass, and on the cheque being paid into the bank it was found that payment had been stopped by Rigby. Rigby was convicted and bound over.

J. W. Morris for the appellant (under s. 10 of the Criminal Appeal Act), who was present. It was an out and out sale. The learned Deputy-Chairman did not direct the jury what was a trick or fraud nor that to support a conviction it must be proved that when the transaction took place there was an intention on the part of the seller to part with the possession only and an intention of the accused to steal the car.

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It was a contract under s. 18 of the Sale of Goods Act, 1893. *Kirkham* v. *Attenborough,* 1897, 1 Q. B. 201; 66 L. J. Q. B. 149; 75 L. T. Rep. 543; 45 W. R. 213: C. A. There was a complete power in Rigby to sell.

B. L. A. O'Malley for the Crown. The appellant was spokesman for both accused, and the transaction started with the falsehood that the car was required to carry round confectionery. It was common ground that Thompson was not going to part with the property in the car until the cheque was cleared. It was a fraud *ab initio.*

The LORD CHIEF JUSTICE, after stating the facts: In order that there might be larceny by a trick it was necessary that the owner of the goods should intend to part only with the possession of and not with the property in the thing stolen. In this case it was crucial to ascertain whether Thompson intended to part with the property in the car and whether the appellant and Rigby intended to steal it. The document acknowledging the receipt of the cheque is susceptible of either an innocent or a guilty interpretation. It is a question whether the acts leading up to and connected with the making of that document showed an intention on the part of the accused to steal the car. There were two other points relied on by the prosecution—that the statements of the purpose for which the car was required were false and that the cheque offered in payment was never intended to be paid. There was abundant evidence upon which the jury could convict. That being so, and the transaction being susceptible of either a guilty or an innocent interpretation, it was necessary to direct the jury carefully, and especially on what the prosecution had to prove. The trial was continued until 8 p.m., and whether it is useful to direct a jury on matters of some difficulty at the close of a very long day is worthy of consideration. It was a case in which it was essential that the law should be fully explained to the jury, and the Court thinks in the circumstances that the conviction is unsatisfactory.

Conviction quashed.

J. N. F.

ALFRED SHEVILL.

1923
26 *February.*

Hewart L.C.J.
Sankey J.
Salter J.

When the gist of the offence is intent, the jury should be expressly asked to deal with that point.

Appeal against conviction and sentence.

Appellant was convicted, at the Middlesex Sessions, on 3rd February, 1923, before the learned Chairman, of attempted burglary, and was sentenced to nine months' imprisonment with hard labour. An attempt was made to enter a house at 3.30 a.m. There were many marks at a window, apparently made by the marline-spike of a soldier's knife, and the appellant, a soldier, admitted that he had attempted to get into the house but with no intent to steal.

Sinclair Johnston for the appellant (under s. 10 of the Criminal Appeal Act), who was present. I submit that appellant did not receive from the Court the assistance usually accorded to persons on trial undefended by counsel. The learned Chairman did not properly instruct the jury, and, further, usurped the functions of the jury.

H. C. Bickmore for the Crown. I submit that the verdict was right. The jury were entitled to presume the intent with which appellant was trying to enter, having regard to all the facts before them.

[Salter J.: Were the jury directed to consider the evidence on intent?]

There was some reference to it by the learned Chairman.

The Lord Chief Justice: It is quite clear that there was abundant material on which the jury might have come to the conclusion that in doing what he did appellant had an intention of stealing. Unfortunately the point about intent does not appear to have been put to the jury, the learned Chairman merely saying that if there was an attempt to enter it must have been with intent to steal. The appellant, it is observed, did not go into

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the witness-box but made a statement from the dock, and the learned Chairman thought it right to put questions to him in the dock. It is also to be noticed that although the alarm had been given and some considerable time had elapsed the appellant was arrested only some seventy-five yards away. In the circumstances this Court considers that the summing-up was so defective that the conviction cannot be upheld. It cannot be said that, with a proper direction, the jury must inevitably have found a verdict of guilty.

Conviction quashed.

J. N. F.

The Court (The Lord Chief Justice, and Sankey and Salter JJ.) also sat on March 5th.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SALTER.

ARTHUR MICHAEL ALEXANDER FORDE.

1923
12 *March.*

Reasonable cause on the part of a defendant for belief that a girl is under the age of sixteen years is not a defence to a charge under s. 1 *of* 12 & 13 *Geo.* 5, *c.* 56, *the Criminal Law Amendment Act*, 1922. *Whether* (*under s.* 2 *of that statute*) *there is such reasonable cause is for the Court* (*of summary jurisdiction*) *or a jury on a plea of not guilty, but not for the judge on a plea of guilty.*

In the absence of mistake, this Court will not entertain an appeal after a plea of guilty pleaded on the advice of counsel.

Appeal against conviction on certificate.

Appellant, a man under twenty-three years of age, pleaded guilty at the Central Criminal Court, on 22nd February, 1923, before the Recorder, to an indecent assault on a girl under the age of sixteen, and was bound over in his own recognizance.

The indictment contained four counts; the first charged him with having unlawful carnal knowledge of Clara Francis Macalister, a girl aged fifteen years; the second with attempting to have unlawful carnal knowledge of her; and the third and fourth counts with indecently assaulting her. The indecent assault was in fact the act of having unlawful carnal knowledge. At the trial appellant pleaded guilty to the third count, and the prosecution accepted that plea, and did not proceed with the remaining counts. The learned Recorder having taken the evidence of Clara Macalister on oath, held as a fact that appellant had reasonable cause to believe that the girl was over the age of sixteen years.

S. 1 of the Criminal Law Amendment Act, 1922, 12 & 13 Geo. 5, c. 56, enacts, "it shall be no defence to a charge or indictment for an indecent assault on a child or young person under the age of sixteen to prove that he or she consented to the act of

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indecency." S. 2 of the Act says, "Reasonable cause to believe that a girl was of or above the age of sixteen years shall not be a defence to a charge under ss. 5 or 6 of the Criminal Law Amendment Act, 1885, . . . provided that in the case of a man of twenty-three years of age or under the presence of reasonable cause to believe that the girl was over the age of sixteen years shall be a valid defence on the first occasion on which he is charged with an offence under this section."*

F. B. Merriman, K.C. (with him *Walter Frampton*) for the appellant, who was not in custody. There was no indecent assault except the act of carnal knowledge.

[The LORD CHIEF JUSTICE: How do you get over the plea of guilty?]

The power to state a case is preserved, and the power to order a case to be stated is vested in this Court by s. 20 (4) of the Criminal Appeal Act, 1907. These powers may be exercised in spite of a plea of guilty (*a*), and the learned Recorder has in effect stated a case.

Counsel referred to *Cade*, 1914, 2 K. B. 209; 83 L. J. K. B. 796; 110 L. T. R. 624; 78 J. P. 240; 24 Cox, C. C. 131; 58 S. J. 288; 30 T. L. R. 289; 10 Cr. App. R. 23.

I submit that the Act of 1922 should be read as a whole, and that as reasonable cause to believe that the young woman was over sixteen was a defence to the charge of unlawful carnal knowledge, it should be read into s. 1 of the statute, where the indecent

* S. 5 of the Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 69 :— Any person who (1) unlawfully and carnally knows or attempts to have unlawful carnal knowledge of any girl being of or above the age of thirteen years and under the age of sixteen years (2) . . . . , shall be guilty of a misdemeanour, and being convicted thereof shall be liable at the discretion of the Court to be imprisoned for any term not exceeding two years, with or without hard labour; provided that it shall be a sufficient defence to any charge under sub-section one of this section if it shall be made to appear to the Court or jury before whom the charge shall be brought that the person so charged had reasonable cause to believe that the girl was of or above the age of sixteen years.

(*a*) *E.g.*, *Riley*, 1896, 1 Q. B. 309; 74 L. T. 254; 44 W. R. 318; 18 Cox C. C. 285; 60 J. P. 519.

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assault is in fact, as here, the act of unlawful carnal knowledge. Otherwise I submit there would be an absurdity. He referred to Maxwell on the Interpretation of Statutes, 6th edition, p. 4. "In construing wills, and indeed, statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to absurdity, or some repugnancy or inconsistency with the rest of the instrument; in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity, repugnancy, or inconsistency, but no further," *per* Lord Wensleydale in *Grey* v. *Pearson*, 6 H. L. C. 61; 26 L. J. Ch. 473; S. W. R. 454: 1857; he also referred to p. 406, where it says, "where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence." I submit that it is just such a case as this where the rule as there laid down should apply.

He referred to *Henderson* v. *Sherborne*, 2 M. & W. 236; 6 L. J. M. C. 28: 1837; *St. John's, Hampstead* v. *Cotton*, 12 A. C. 1; 56 L. J. Q. B. 225; 56 L. T. R. 1; 34 W. R. 505; 51 J. P. 540: 1886; *Miller* v. *Salomons*, 7 Ex. R. 475: 1852.

Eustace Fulton for the respondents. I do not contend that the result of the statute is not absurd, but the words are clear, and to ask this Court to put any other interpretation on them is asking the Court to legislate.

The appeal was dismissed.

Appeal dismissed.

J. N. F.

Solicitors for the Appellant—*Percy Robinson & Co.*
Solicitors for the Respondents—*Wontner & Sons.*

19 *March.*

AVORY J. read the following judgment of the Court:—

This appeal raises a question about the meaning and effect of ss. 1 and 2 of the Criminal Law Amendment Act, 1922.

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The appellant, who is under twenty-three years of age, pleaded guilty to a count in the indictment charging him with indecent assault on a girl under sixteen years of age, contrary to s. 52 of the Offences Against the Persons Act, 1861. Another count in the indictment charged him with carnal knowledge of the same girl contrary to s. 5, sub-s. 1 of the Criminal Law Amendment Act, 1885.

Counsel for the prosecution at the trial accepted this plea and elected not to proceed further on the indictment, and the appellant thereupon became entitled, if he had so insisted, to have a verdict of not guilty recorded on the charge of carnal knowledge, the prosecution having admitted that the only indecent assault alleged was the act of carnal knowledge. The learned Recorder of London has granted a certificate for an appeal to this Court upon the grounds "that the alleged indecent assault consisted solely in the act of carnal knowledge of a girl under sixteen by a man under twenty-three, who had, in law and in fact, a complete defence to such act of carnal knowledge," and from the observations made by him it appears that he was under the impression that it was for him to determine as a question of fact whether the appellant had in the circumstances reasonable grounds for believing that the girl was of or above the age of sixteen years.

In this view we think he was wrong. The words in the proviso to sub-s. 1 of s. 5 of the Criminal Law Amendment Act, 1885, "if it shall be made to appear to the Court or jury before whom the charge shall be brought," have always been construed to apply respectively to the Court, *i.e.*, the magistrate or justices before whom the accused is brought with a view to his committal for trial, and the jury when he is put upon his trial. This proviso is repealed by the Act of 1922, and although the proviso to s. 2 of that Act does not contain the words "the Court or jury," we think that upon the trial this question of fact is to be determined by the jury, but it may be assumed for the purposes of this appeal that the prosecution was satisfied that if the indictment had been proceeded with on the charge of carnal knowledge, the appellant would have had a good defence under the proviso to s. 2 of the Act of 1922, and for that reason accepted the plea to the indecent assault.

The first question that arises is whether this Court can entertain the appeal. A plea of guilty having been recorded, this Court

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can only entertain an appeal against conviction if it appears (1) That the appellant did not appreciate the nature of the charge, or did not intend to admit that he was guilty of it; or (2) That upon the admitted facts he could not in law have been convicted of the offence charged.

The first ground is not open to the appellant, as he was advised by counsel of experience, who had given careful consideration to the facts and to the provisions of the amending statute of 1922, but it has been strenuously contended by Mr. Merriman in an able argument that upon the admitted facts the appellant could not in law have been convicted of the indecent assault, and he invited the Court to say that the defence provided in s. 2 of the Act of 1922 was, under the circumstances, equally available upon the charge of indecent assault, an offence dealt with in s. 1, and that the statute should be so construed to avoid the absurdity which otherwise would result in circumstances such as those of the present case. In support of this argument he cited cases in which the language of a statute has been construed in a modified sense with reference to the obvious intention of the Legislature, but the authorities are clear that if there is nothing to modify, nothing to alter, nothing to qualify the language, it must be construed in the ordinary and natural meaning of the words and sentences. The words of a statute cannot be construed contrary to their meaning as embracing cases merely because no good reason appears why they should be excluded. It is not the duty of the Court to make the law reasonable, but to expound it as it stands according to the real sense of the words, and applying that principle we can find no justification for reading the proviso to s. 2 of the Act, which in terms is limited to charges of offences under that section, as applicable to a charge of indecent assault, which is separately dealt with in s. 1. It is only by a benevolent construction that any effect can be given to this proviso, seeing that no offence is created under s. 2, but if it be assumed to apply to charges under ss. 5 or 6 of the Criminal Law Amendment Act, 1885, which are referred to in the earlier part of the section, there is no canon of construction which would justify the Court in applying it to s. 1, bearing in mind the various forms of indecent assault which do not amount to carnal knowledge.

The result of this legislation is that a boy who is tempted and induced to have carnal knowledge of a girl who misrepresents herself to be over sixteen, and who appears to be so, has no possible

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answer if he is charged with indecent assault and not with the full offence.

It is to be observed that the effect of the proviso in s. 2 being applied to charges under ss. 5 or 6 of the Criminal Law Amendment Act, 1885, will be to afford a new defence to a man under twenty-three years of age who has carnal knowledge of an idiot or imbecile female contrary to sub-s. 2 of s. 5 of that statute, a result which probably was never intended, seeing that the object of the Act of 1922 was to curtail and not to extend the defences which were previously open to the accused.

Other serious questions will arise in the practical application of this proviso about the burden of proof and the manner in which it is to be ascertained whether the accused has been previously charged with an offence under the section, whatever that may mean, and the effect of such evidence in a case where the previous charge has been dismissed. Any such questions will have to be determined when they arise, and we express no opinion upon them in anticipation.

For the reasons given the Court is of opinion that this appeal must be dismissed

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BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER AND MR. JUSTICE BRANSON.

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26 (& 27)
March.

JOSEPH COLLINS.

Application for leave to appeal against sentence.

Applicant, who was not present, pleaded guilty at the Central Criminal Court, on February 21st, 1923, to possessing forty-five counterfeit coins with intent to utter them, and was sentenced by the Recorder of London to five years' penal servitude. The learned judge had reported that in view of *Smith's* and *Wilson's* cases, 1909, 2 K. B. 756; 2 Cr. App. R. 271, and as applicant would have to serve a *remanet* sentence, he felt compelled to pass this sentence; otherwise the term would have been four years. As possibly there had been some misunderstanding of that case, the Court granted leave to appeal.

Leave to appeal granted.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE ROCHE.

JOSEPH COLLINS.

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16 *April.*

A remanet *term must be served* after *expiry of sentence.*

See p. 104 above.

Appellant in person.

THE LORD CHIEF JUSTICE: The law relating to this matter is clear. In the case of a prisoner who, under s. 9 of the Penal Servitude Act, 1864, 27 & 28 Vict. c. 47, has to serve a *remanet* on being again convicted, there is no power to order that the *remanet* shall precede or run concurrently with the sentence imposed for the offence of which he is convicted. The *remanet* must follow that sentence. To deal with this case only, it does appear from the report of the learned Recorder that in his view this particular case might be suitably dealt with by a sentence of four years' penal servitude, and the Court proposes to substitute that sentence. The *remanet* will follow after it.

Sentence reduced.

J. N. F.

BENJAMIN ADLER.

Even when the shorthand note of the trial is not in counsel's hands, notice of appeal must state, at least generally, the grounds and particulars relied upon.

Application for leave to appeal against sentence.

Applicant was convicted at the Central Criminal Court on 20th February, 1923, before the Common Sergeant, after a trial lasting ten days, of conspiracy to defraud, and was sentenced to twelve months' imprisonment in the second division.

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16 *April.*

BENJAMIN ADLER.

Hewart L.C.J.
Avory J.
Roche J.

Sir H. Smith (with him *C. A. Collingwood*) for the applicant, who was not present.

The LORD CHIEF JUSTICE called attention to the fact that it had been laid down by the Court that particulars of misdirection and objections to the summing-up must be stated in the notice of appeal, and that the fact that the transcript note of the trial had not been received was not a ground for allowing such particulars to be relied upon in that Court without such notice, *Wyman*, 13 Cr. App. R. 163: 1918; though in this case that indulgence would be granted. In dismissing the application his Lordship said that it was frivolous, involving the cost of the transcript of over 600 pages, and was an instance strengthening the view that some of the rules under which persons could appeal to that Court should be amended.

Application dismissed.

J. N. F.

Solicitor for the Applicant—*Freke Palmer.*

JOSEPH GREENBERG.

In a proper case the Court will hear fresh relevant evidence about the character of a prosecutrix which was not forthcoming at the trial.

Application for leave to appeal against conviction and sentence.

Applicant was convicted at the Birmingham Assizes on 15th March, 1923, before Shearman J., of indecent assault, and sentenced to six months' imprisonment.

Sir H. Curtis Bennett (with him *A. R. Churchill*) for the applicant, who was not present.

[The LORD CHIEF JUSTICE: There appear to be matters which should be argued and certain witnesses called before this Court, and this application is granted.]

Curtis Bennett applied for bail, renewing an application which had been made to Swift J.

The Lord Chief Justice: No. It is only in very exceptional cases that bail is allowed by this Court.

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16 *April.*

Joseph Greenberg.

Hewart L.C.J.

Leave to appeal granted.

Bail refused.

J. N. F.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE SANKEY.

JOSEPH GREENBERG.

23 *April.*

Sir H. Curtis Bennett (with him *A. R. Churchill*). The trial was unsatisfactory. The evidence of the prosecutrix was in fact uncorroborated, and there was misdirection and non-direction by the judge. The learned judge never put to the jury the law of corroboration, and that in this case there was available evidence which would have tended towards corroboration. The torn bloomers were not produced; no evidence was called about any marks upon appellant, although prosecutrix said she struggled and screamed; there was no medical examination of the man or woman. The learned judge assumed in the summing-up that the prosecutrix was a moral woman, and it is now desired to call further evidence which was not available at the trial, that the assumption of prosecutrix being a moral woman was false.

[The Lord Chief Justice: We have in mind the passages in the summing-up which you refer to. As I gather from the short-hand notes at the trial the point of attack was not the character of the prosecutrix, not did she put her character in issue. Suppose you had put such questions to her at the trial and she had denied them, could you have given affirmative evidence of that character?]

In my submission I should not be entitled to call evidence of any particular acts of indecency committed by her, but I am entitled to show her of notoriously immoral character and repu-

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23 *April.*

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tation. *Riley*, 18 Q. B. D. 481; 56 L. J. M. C. 52; 56 L. T. R. 371; 16 Cox C. C. 191: 1887; C. C. R. c. q.

[The LORD CHIEF JUSTICE: You are asking leave to give certain evidence, and the first step in that proceeding would be for the prosecutrix to go into the box and be cross-examined. The fair course would be that the prosecutrix should be called and further cross-examined.]

Curtis Bennett, K.C.: That I may cross-examine her, not on facts in the case, but on her character.

Prosecutrix was called and cross-examined on her character, suggestions against which she denied, and was re-examined by *Finnemore* for the Crown.

Two female witnesses were called to give evidence about prosecutrix's companionship with men from their own observation, and were examined and cross-examined thereon and about statements made by prosecutrix to them that she had charged appellant with the offence in order to obtain money from him.

D. L. Finnemore. There is a direct conflict of evidence. The point is made that the case was got up to get money out of appellant, but there has been no suggestion throughout that prosecutrix asked for money.

[AVORY J.: People do not always ask for what they expect.]

She went straight out of the house and complained to a woman opposite, and then to a policeman. There could have been no opportunity for appellant to offer money. I submit further that the statements of these witnesses show that the evidence was available before the trial.

The LORD CHIEF JUSTICE: This appellant was indicted for attempted rape and indecent assault. He was convicted of indecent assault, and he now, by leave of the Court, appeals against that conviction. On the 3rd January, the prosecutrix was engaged by appellant's wife to do domestic work, and she went to the house on 4th January and again on 5th January. The case for

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23 *April.*

JOSEPH GREENBERG.

Hewart L.C.J.

the prosecution was that appellant made certain proposals on 4th January, and was guilty of an indecent assault on 5th January. It is alleged that appellant let her into the house on that day and that later he committed the act complained of, and that she struggled and screamed. It appears that she had had an illegitimate child and had been living apart from her husband. A milkman who was there about the time the offence was alleged to have been committed said he saw and heard nothing, and the underclothing of the prosecutrix, which it is said was torn in the struggle, was not produced at the trial. Having been arrested, appellant said: "Me touch you! I never did; it's money you want." The jury convicted appellant, not of rape or attempted rape, but of indecent assault. It is clear that the original charge upon the information given by prosecutrix was one of rape, though it is true that that charge was not included in the indictment. There were features of suspicion, but I need not enter into detail except to say that it is clear from the summing-up that the learned judge acted on the assumption that the prosecutrix was a modest woman. Leave was asked and given to call further evidence. This Court has had the advantage of hearing that evidence, and it is enough to say that in the opinion of this Court that evidence was of such a nature that we are not satisfied that if it had been before the jury at the trial they must inevitably have convicted. In these circumstances this appeal is allowed

Conviction quashed.

J. N. F.

Solicitors for the Appellant—*Oswald, Hanson and Smith.*

WILLIAM TAYLOR.

Before evidence is admissible of defendant's possession of a thing which may be used in the committing of the alleged offence, some nexus *must be established between the particular thing and the particular offence charged.*

Appeal against conviction and sentence by leave of the Court on April 16th.

Applicant was convicted at the Warwick Assizes on 12th March,

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WILLIAM TAYLOR.

Hewart L.C.J.
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1923, before Bailhache J., of shopbreaking, and sentenced to twenty-one months' imprisonment with hard labour.

C. K. Tatham for the appellant (under s. 10 of the Criminal Appeal Act), who was present. I submit that evidence was wrongly admitted, there was an inadequate summing-up, and there were other irregularities which make the trial so unsatisfactory that the conviction should not stand. There was no evidence that any instrument was used to break open the shop, and nothing was stolen, yet evidence was given of the finding at appellant's house of an alleged jemmy, which was inadmissible, as there was no connection between what appellant was alleged to have done and the instrument. *G. Manning,* 17 Cr. App. R. 85: 1923: c. q.; *F. Rodley,* 1913, 3 K. B. 468; 82 L. J. K. B. 1070; 109 L. T. R. 476; 77 J. P. 465; 23 Cox, C. C. 574; 9 Cr. App. R. 69: c. q.; *Thompson,* 1918, A. C. 221; 87 L. J. K. B. 478; 118 L. T. R. 418; 82 J. P. 145; 26 Cox, C. C. 189; 13 Cr. App. R. 61. Even if this evidence was admissible, the learned judge, in his summing-up, treated the instrument found as a jemmy, although appellant disputed that, and it should have been left to the jury to decide whether it was a burglarious tool. The learned judge asked questions of the appellant when he was in the dock and before he was sworn, and while under arrest the police had asked questions of the appellant without cautioning him, and gave evidence of such questions.

[AVORY J.: This Court has laid it down as a rule that the police must not examine accused persons after they are in custody. *Grayson,* 16 Cr. App. R. 7: 1921.] .

C. W. Iliffe for the Crown. The evidence regarding the jemmy was admissible. *Twiss,* 1918, 2 K. B. 853; 88 L. J. K. B. 20; 119 L. T. R. 680; 83 J. P. 23; 26 Cox, C. C. 325; 13 Cr. App. R. 177. If there were irregularities, I submit that there was no miscarriage of justice, and that the proviso to s. 4 of the Criminal Appeal Act, 1907, should apply.

The LORD CHIEF JUSTICE: In this case a police officer gave evidence that at about midnight he saw appellant and another man outside a refreshment shop, heard the door forced open, and

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saw the appellant and the other man run out. Being arrested, appellant denied any attempt to commit an offence, and said that the affair was a drunken escapade, that he and the other man had been drinking and, playing football with a cabbage stalk, had charged one another against the door and broken it open. There were no marks of any instrument on the door and nothing was stolen. It is conceded on the part of the prosecution that there were some irregularities at the trial, but it is said that those irregularities do not matter, and that under the proviso to s. 4 of the Criminal Appeal Act the conviction ought to stand. The Court cannot take that view. Although appellant was arrested on the spot, and there were no marks to suggest that an instrument had been used, evidence was given of an alleged jemmy having been afterwards found in his house. He was questioned by the police about the jemmy eight days after his arrest, and evidence was given of that questioning. There are other matters also which make the trial unsatisfactory.

Conviction quashed.

J. N. F.

SIDNEY WILLIAM RIGBY.

The Court will not entertain an application for extension of time for leave to appeal, except on strong grounds.

Application for extension of time for leave to appeal against conviction.

Applicant, who was not in custody, was convicted on 3rd February, 1923, at the Middlesex Sessions, before the Deputy-Chairman, of larceny, and was bound over and ordered to pay £20 towards cost of the prosecution.

The LORD CHIEF JUSTICE: This appellant was convicted at the Middlesex Sessions on 3rd February, 1923, together with a man named Spinney, of stealing and receiving a motor car. Spinney

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applied at once for leave to appeal against conviction, and his appeal was allowed and his conviction quashed (above, p. 96). On 21st March, that is just over five weeks after the lapse of the ten days in which application for leave to appeal should be made, this appellant applied for an extension of time in which to appeal against conviction. The reason he gives for this delay is that he was misled by his late solicitors, who had given him the impression that they were appealing on his behalf. Enquiries were made of the appellant whether he instructed his solicitors to appeal, and if so, on what date, and his answer is that he instructed them in writing on 28th February, that is to say, two days after Spinney's appeal had been allowed, and he does not profess to give any reason for not appealing before that date, which was more than a fortnight out of time. The time, ten days, within which notice of appeal or application for leave to appeal should be given is fixed by s. 7 of the Criminal Appeal Act, 1907, and there is a notice in the cells informing persons who have been convicted that if they wish to appeal they should send in their notice within that time. Though power is given by the same section to extend this time, except in the case of sentence of death, it is clear that the Act, the practice and the rules of this Court all contemplate that the application or appeal should be made within ten days. Where it is not so made, unnecessary inconvenience is generally caused, for instance, where exhibits have been put in, the court of trial keeps control of those exhibits for ten days after conviction. After ten days such exhibits are returned, if no appeal is entered, to the persons who produced them, and it is often difficult after their return to trace such persons and obtain the exhibits. As was laid down by Lord Alverstone in the case of *E. Rhodes*, 74 J. P. 380; 5 Cr. App. R. 35: 1910, it must not be understood that an extension of time will be granted as a matter of course; the Court will require substantial reasons to be advanced before they will grant such an extension.

In cases where, as in the present case, a prisoner has been indicted and convicted with another prisoner, and one of them appeals within the proper time, but the second does not attempt to appeal or apply for leave to appeal till the result of the appeal of the first prisoner is known to him, all the reasons for prompt appeal by a person convicted alone apply, but, in addition, delay

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by a person jointly convicted causes unnecessary expense to the public, and unnecessary work to the judges and others. For instance, if in this case an extension of time and leave to appeal were granted, the Director of Public Prosecutions would again have to brief counsel, and counsel would in all probability have to be assigned for the appellant at the expense of local funds, whilst if the two appeals had been heard together there would have been one counsel for the Director of Public Prosecutions, and one counsel only would in all probability have been assigned for both appellants, though the actual cases against each were not identical. In addition there is waste of time, *e.g.*, of the officers of this Court and of the court of trial.

In this case it is clear that the appellant never thought that he had any ground for appealing until he heard that *Spinney's* conviction had been quashed. In itself the mere fact that a fellow-prisoner's conviction has been quashed is no ground for extending the time for appealing of another prisoner.

In the present case it is to be observed that there was a clear distinction between appellant's case and *Spinney's* case, and considering the particular part played by this appellant the jury might well have convicted him, at any rate, of false pretences.

Application dismissed.

J. N. F.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE BRANSON.

JOHN RUDGE.

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Even in a case where corroboration is not legally essential, a confusion in the summing-up upon the nature and meaning of corroboration may invalidate a conviction.

Appeal against conviction.

Appellant was convicted at the Leeds Assizes on 20th March, 1923, before Mr. Commissioner Waugh, K.C., of carnal knowledge of a girl under sixteen years of age, and sentenced to nine months' imprisonment with hard labour.

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C. Paley Scott for the appellant, who was present. The substantial ground of appeal is misdirection by the learned Commissioner in putting to the jury as evidence of corroboration of the girl's story matters which in fact were in no way corroboration.

[The LORD CHIEF JUSTICE: In *Baskerville*, 1916, 2 K. B. 658; 86 L. J. K. B. 28; 115 L. T. Rep. 453; 80 J. P. 446; 25 Cox, C. C. 524; 60 S. J. 696; 12 Cr. App. R. 81, it was pointed out that, even in the case of the evidence of an accomplice, the jury may convict without corroboration, and in the case of a victim, so to say, corroboration is not necessary, as was pointed out in the case of *Crocker*, 17 Cr. App. R. 46: 1922; the learned Commissioner told the jury that if they did not believe the girl's story there was an end to the case.]

I admit that, and that he said they ought not to convict without corroboration.

[The LORD CHIEF JUSTICE: That was unduly favourable to the accused. He employed the warning used in regard to the evidence of an accomplice in a case where he was dealing with the evidence of an alleged victim.]

Yes, but he told the jury that certain evidence was corroboration of the girl's story, when it was not so in fact. He pointed out that the girl's story that she had in fact had connection with the defendant on other occasions was corroboration. Having made corroboration the keynote of the case by the strength of his warning not to convict without it, he then dealt with the evidence in such a way as to lull the jury into a false sense of security by suggesting that there was ample corroboration so as to make it safe to convict; in fact there was no corroboration or none of any real value.

[SHEARMAN J.: It was not corroboration in the legal sense, but it was part of the girl's story and material which may help the jury to make up their minds.

The LORD CHIEF JUSTICE: Corroboration must be corroboration in a *material* particular *implicating the accused*.]

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J. W. Morris for the Crown, referred to *Dossi*, 87 L. J. K. B. 1024; 13 Cr. App. R. 158: 1918. There was corroboration, there was the opportunity, the evidence of the doctor, and the evidence of the girl's brother that she was where she said she was at the important time.

[THE LORD CHIEF JUSTICE: The question is whether evidence which was not corroboration was called corroboration in the summing-up.]

THE LORD CHIEF JUSTICE, after reciting the facts: The real criticism is that the summing-up was unsatisfactory so far as it had to do with the question of corroboration. With regard to the question of corroboration and the duty of the learned judge presiding, there is no room for doubt. In *Baskerville* (above), 1916, 2 K. B. at p. 663, Lord Reading said: "It has long been a rule of practice at common law for the judge to warn the jury of the danger of convicting a prisoner on the uncorroborated testimony of an accomplice or accomplices, and, in the discretion of the judge, to advise them not to convict upon such evidence; but the judge should point out to the jury that it is within their legal province to convict upon such unconfirmed evidence." That is the rule even with an accomplice, and *a fortiori*, as was pointed out in the case of *Crocker*, when one is dealing with the evidence of a person who is not so much an accomplice as a victim, the jury may convict on that uncorroborated evidence. In the present case the learned Commissioner began by saying that the girl's story was difficult to disprove, and that it was not wise to convict unless there was corroboration of her story; that the jury might convict in law, but that it was his duty to tell them that they ought not to do so. If the matter had been left there there could have been no complaint, but how did the learned Commissioner proceed with the question whether there was corroboration or not? He dealt with five different matters; all were treated on the same plane, and all were treated as offering corroboration of the girl's story so as to implicate the appellant. (1) It was treated as corroboration that the girl said there were four other occasions on which she had had connection with appellant; that was merely her own story. (2) The evidence of the girl's mother, a mere repetition of the girl's statement, not voluntarily obtained through the girl com-

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plaining, but admittedly elicited with difficulty by the mother after the girl had made false statements; that was stated to be corroboration of the girl's story. (3) The jury were told that there was corroboration in the doctor's statement that it was quite clear that someone had had connection with the girl. (4) There was said to be corroboration by the brother, who said that he and his cousin had left the girl in the neighbourhood of appellant. (5) There was a statement about a sack, but on this point the learned Commissioner was corrected, and he then told the jury not to consider it.

It has been urged for the appellant that it is one thing to say "it is unsafe to convict without corroboration and there is only slight corroboration," but it is another thing to say "it is unsafe to convict without corroboration but here there are four separate heads of corroboration," and it is of little avail, after so directing the jury, then to say at the end of the summing-up that it was for the jury to say whether they believed the girl's story or not.

This Court cannot say that if the question had been adequately dealt with the jury must inevitably have convicted. In these circumstances there is no course open to us but to allow the appeal and quash the conviction.

Conviction quashed.

J. N. F.

Solicitor for the Appellant—*J. W. Martin,* Normanton, Yorks.

WILLIAM EDWARD JAMES.

A mistaken date in an indictment, unless the date is of the essence of the offence, or the accused is prejudiced, need not be formally amended.

Leave to appeal against conviction and sentence was granted by the full Court on April 23rd.

Applicant was convicted at the Cardiff Assizes on 15th March, 1923, before Swift J., of rape, and sentenced to five years' penal servitude.

Morgan Evans for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present.

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Pepyat Evans for the Crown.

The LORD CHIEF JUSTICE: The only point in this appeal is that, while the offence was charged in the indictment as having been committed on 20th February, the date referred to in the depositions and the evidence was the 16th February. At the opening of the case, counsel for the prosecution suggested that the date should be amended in the indictment, but it was not amended, as the learned judge held the date to be immaterial.

Reference has been made to the case of *Dossi*, 87 L. J. K. B. 1024; 13 Cr. App. R. 158: 1918; and it is to be observed that that decision was given after the passing of the Indictments Act, 1915. In that case Atkin J. pointed out that from time immemorial a date specified in an indictment has never been a material matter unless "time is of the essence of the offence," and after citing authorities, went on to say, "Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence."

That decision is sufficient to dispose of this appeal.

Appeal dismissed.

J. N. F.

WILLIAM JONES.

To suggest that a witness has fabricated evidence, and obtained successive remands for the purpose, is an "imputation on" his "character" within s. 1 (f) (ii) of the Criminal Appeal Act.

Appeal against conviction.

Appellant was convicted at the Liverpool City Sessions on 6th April, 1923, before the Recorder, of burglary, and was sentenced to three years' penal servitude.

J. I. Parry for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. There is only one ground of appeal, and that is that the learned Recorder was not right in allowing the prisoner to be cross-examined on previous convictions

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on the ground that he had attacked the character of witnesses for the prosecution by denying an alleged statement by himself, and saying that it was invented by the police. Counsel cited *Rouse,* 1904, 1 K. B. 184; 73 L. J. K. B. 60; 89 L. T. R. 677; 52 W. R. 236; 68 J. P. 14; 20 Cox, C. C. 592; 20 T. L. R. 68: c. q.; *Preston,* 1909, 1 K. B. 568; 78 L. J. K. B. 335; 100 L. T. Rep. 303; 73 J. P. 173; 53 S. J. 322; 21 Cox, C. C. 773; 25 T. L. R. 280; 2 Cr. App. R. 214: c. q. Appellant was merely denying the statement, and by denying it he must imply it was made up.

[BRANSON J.: Here it was a very emphatic charge.

SHEARMAN J. referred to *Wright,* 5 Cr. App. R. 131: 1910. Here appellant said that the police deliberately held him up on remand after remand, and as they could not get evidence they concocted it.]

Counsel referred to *Sheean,* 72 J. P. 232; 24 T. L. R. 459; 21 Cox, C. C. 561: 1908; *Bridgwater,* 1905, 1 K. B. 131; 74 L. J. K. B. 35; 91 L. T. Rep. 838; 53 W. R. 415; 69 J. P. 26; 20 Cox, C. C. 737; 21 T. L. R. 69: c. q.

[The LORD CHIEF JUSTICE: It is one thing to deny a statement; it is another thing to say that the statement has been deliberately and elaborately manufactured.]

G. G. Blackledge for the Crown was not called upon.

The LORD CHIEF JUSTICE: This appellant appeals against conviction upon the ground that the learned Recorder wrongly allowed him to be cross-examined upon his previous convictions. It is not seriously contested that there was ample evidence on which the jury might have convicted. The matter arose in this way. Evidence was given by an inspector that he saw appellant in custody, and that appellant said, "I got in there, the stuff went out of Liverpool the same night by motor." Various questions having been put to appellant by his counsel, he was asked how many times he was in Court before, and he replied to the effect that he was brought up on remand after remand, and that as the police had no

evidence, the statement alleged by the inspector had been invented. The learned Recorder asked what was meant, and counsel informed him that he was instructed by his client that he was brought up on remand four times. The learned Recorder then asked, "Is it your case that the police obtained four remands in order to manufacture evidence?" and counsel admitted that those were his instructions. The whole question turns on s. 1 (f) of the Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36. That section says, "a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless," and (ii) "he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

Attention has been directed to the cases of *Rouse*, *Preston*, *Sheean* and *Bridgwater* (above) What emerges from an examination of those cases is that it is often difficult to say on which side of the line a case falls. The present case is one of that kind. The matter was considered in the case of *Preston*, 1909, 1 K. B. 568, where Channell J., at p. 575, said: "If the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct—not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner about his antecedents and character with the view of showing that he has such a bad character that the jury ought not to rely upon his evidence. That is the general nature of the enactment and the general principle underlying it."

A clear line is drawn between words which are an emphatic denial of the evidence and words which attack the conduct or character of the witness. Applying that *ratio decidendi* to the present case, it appears to this Court that it comes within the line

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of saying what is forbidden. It was one thing for appellant to deny that he had made the confession; but it is another thing to say that the whole thing was a deliberate and elaborate concoction on the part of the inspector; that seems to be an attack on the character of the witness.

Appeal dismissed.

J. N. F.

Solicitor for Respondents—*The Town Clerk of Liverpool.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SHEARMAN AND MR. JUSTICE BRANSON.

DAVID EVANS-JONES.
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In some charges under the Prevention of Corruption Acts, 1906 *and* 1916, *and the Public Bodies Corrupt Practices Act*, 1888, *where certain conditions have been fulfilled, the burden of proof that the receipt of payment was corrupt is not on the prosecution: the burden is on the defendant to show to the satisfaction of the jury that it was not corrupt.*

Appeals against conviction.

Appellants were convicted at the Cardiff Assizes on 22nd March, 1923, before Swift J., of corruption, and sentenced to six months' imprisonment in the second division.

There were also charges of conspiracy on which appellants were acquitted.

Evans-Jones was a director of a company holding a contract with the Aberdare Urban District Council in connection with a housing scheme, and *Jenkins* was the architect of the Council.

The appellants were tried under the Prevention of Corruption Acts, 1906 and 1916, 6 Edw. 7, c. 34, and 6 & 7 Geo. 5, c. 64. S. 2 of the Act of 1916 enacts that "Where in any proceedings against a person for an offence under the Prevention of Corruption Act, 1906, or the Public Bodies Corrupt Practices Act, 1889, it is proved that any money, gift, or other consideration has been paid or given to or received by a person in the employment of His Majesty or any Government Department or a public body by or from a person, or agent of a person, holding or seeking to obtain a contract from His Majesty or any Government Department or public body, the money, gift or consideration shall be deemed to have been paid or given or received corruptly

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as such inducement or reward as is mentioned in such Act unless the contrary is proved."

A series of payments by Evans-Jones to Jenkins was proved, and the ground of appeal was that the learned judge was wrong in law in telling the jury that, inasmuch as the payments were admitted by the accused to have been made, and that the Act deemed the said payments to have been made corruptly unless the contrary were proved by the accused, if after hearing the defence the jury had any doubt, then the jury must find the accused guilty.

T. Artemus Jones, K.C. (*T. Jenkin Jones* with him), for Evans-Jones, who was not present. The learned judge was wrong in telling the jury if they were in any doubt they must convict.

[SHEARMAN J.: The 1916 statute says such payments are corrupt unless it is proved to the contrary, that is, by the accused.]

I submit the Legislature has never passed any Act of Parliament which says that, in a criminal case where there is a question of doubt, the Crown is to have the benefit of it.

[SHEARMAN J.: In the case of insanity the *onus* of proof is on the accused, and he must satisfy the jury.]

If the jury are in a state of doubt they are bound to give the accused the benefit of that doubt.

He referred to *E. Ward*, 1915, 3 K. B. 696; 60 S. J. 27; 11 Cr. App. R. 245, c. q.; and *Tatam* v. *Haslar*, 23 Q. B. D. 345; 58 L. J. Q. B. 432; 38 W. R. 109: 1889.

J. A. Lincoln Reed for Jenkins (under s. 10 of the Criminal Appeal Act), who was not present.

Sir Ellis Griffith, K.C., and *Trevor Hunter*, for the Crown, were not called upon

The LORD CHIEF JUSTICE, after reciting the facts: There was a series of substantial payments by the appellant Evans-Jones to

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the appellant Jenkins, and, in view of the proved position and relationship of those two persons, the only question was what was the nature of those payments. The statute says that in the circumstances the payments are to be deemed to be corrupt unless the contrary is proved. Evidence was given of the payments, and the only complaint is that the learned judge misdirected the jury on the burden of proof. He told the jury that if they were satisfied with the explanation of the appellants that the payments were honestly made they should acquit, and if they were not satisfied they should convict; that they were to remember that the prosecution must satisfy them that the defendants were guilty of the conspiracy, and in case of doubt they must acquit, and that the defendants must show that the payments were not corrupt, and if they had any doubt on that, they must convict. It is argued that the learned judge was wrong in his direction on the law of the burden of proof, and reliance was placed on the cases of *Ward* and *Tatam* v. *Haslar* (above). With regard to the first case, it dealt with an entirely different matter and throws no light on this case; and with regard to the second case, it appears that the interpretation put upon the word "prove" not only does not help, but is fatal to the appellants' contention. The Legislature has provided in clear terms that, where certain conditions are fulfilled and certain payments are made, such payments shall be deemed to be corrupt until the contrary is proved, and the Legislature cannot be supposed to have thought it worth while to enact that statute if all it meant was that such payments, made in such circumstances, were to be deemed to be corrupt only until some explanation, however grotesque or false, might be offered to explain them. The explanation required is an explanation which satisfies the jury.

Appeals dismissed.

J. N. F.

Solicitor for one Appellant—*J. Evan Rowlands,* Swansea.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ROCHE AND MR. JUSTICE BRANSON.

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JOHN PROCTOR.
JAMES WHITFIELD.
HAROLD PROCTOR.
FREDERICK MORRISON.

Where, though the prosecution has abandoned a count in the indictment, a general verdict has been returned, the Court may amend the record of the verdict. Severity of sentence.

John Proctor and James Whitfield appealed against conviction on leave granted, and Harold Proctor and Frederick Morrison applied for extension of time for leave to appeal against convictions for guilty receiving. All were convicted at Durham County Sessions on 2nd April, 1923, before the Deputy-Chairman, of receiving, and were sentenced—John Proctor to nine months' imprisonment with hard labour, James Whitfield to four months' imprisonment with hard labour, Harold Proctor to nine months' imprisonment with hard labour, Frederick Morrison to six months' imprisonment with hard labour. The facts appear from the judgment.

R. S. Stewart for John Proctor and James Whitfield (under s. 10 of the Criminal Appeal Act), who were present.

C. W. Muir for the Crown.

The LORD CHIEF JUSTICE: The appellants, John Proctor and James Whitfield, were convicted at Durham County Sessions on an indictment charging them with stealing from the person of a Mr. Miller and with receiving. Three other defendants were also indicted and convicted with these appellants, namely, Harold Proctor, Wilfred Proctor and Frederick Morrison, of whom

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Harold Proctor and Frederick Morrison now apply for an extension of time for leave to appeal against conviction, and it has been thought convenient by the Court that, as the cases are closely connected, they should be dealt with together, although two are final appeals and two are applications.

There were one or two unfortunate irregularities in the course of trial. There were no shorthand notes taken, an irregularity which counsel has attempted to explain, but the explanation of the irregularity appears to be inadequate.

It is stated by counsel that the charge of larceny from the person was dropped by the prosecution and only the charge of receiving proceeded with. But if one looks at the indictment and endeavours to understand it, one thing is plain, and that is that the verdict recorded is quite general, and, if the document remains without an appropriate note on its face, the appellants will stand for all time as having been convicted of larceny from the person.

The facts, as far as appears from the notes, are that at 8.40 p.m., or thereabouts, on a Saturday evening, Mr. Miller was getting on a tramcar at Stockton-on-Tees and was hustled by a person behind and another in front and then missed a diary containing five £1 notes. Five other £1 notes remained on his person. The whole ten had been drawn from his bank and were in consecutive numbers, of which he had fortunately taken a memorandum. Some twenty minutes later, five men, strangers to the place, were seen in the "Talbot" public-house, and, after drinks had been bought, Harold Proctor ordered and paid for further liquor with one of the stolen notes, which note the barmaid saw him crumple up, and as it was new she thought that it might be a bad one, and she informed the manager. Morrison paid for other drinks with another of the stolen notes. John Proctor asked about the omnibus to Darlington. The appellants were seen to arrive at the railway station shortly after the 9.35 p.m. for Darlington had left, and they then drove off in a taxi-cab. The police at Darlington were informed by telephone and a detective went to the railway station. There he saw three men, one of whom, Harold Proctor, he knew, and then he saw three other men. The first three got into a train for Newcastle, and then the second group of men came from the booking office, into which another of the stolen notes was paid,

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on to the platform, and one of them spoke to the detective and made a signal to the first three. All went by the train to Newcastle, and on arrival the five defendants were arrested there; Harold Proctor said that they had all been to Stockton, the others saying 'That's right." At the trial the defence of John Proctor was that he was in the "Talbot" public-house but had nothing to do with the passing of the notes, and Whitfield's defence was that he was not in Stockton at all.

It remains to mention the applications for an extension of time for leave to appeal; each applicant is eighteen days out of time and gives the same explanation, namely, that he did not hear from his solicitor till 14th April, but there is no explanation of the further delay. Now inasmuch as, on the 25th April, leave to appeal was granted to John Proctor and James Whitfield, it is reasonable to suppose that the granting of their applications was the cause of these applications for an extension of time. The case against these appellants was stronger than the case against the two others as there was clear evidence that these appellants passed stolen notes.

Whatever doubts may have arisen, in the absence of a shorthand note, the Court is satisfied, after hearing that the depositions were closely followed, and after hearing Mr. Muir's contemporary note of the proceedings, that the convictions ought not to be disturbed. There are some unsatisfactory features in the case, and the Court directs that a proper note be made to remove the effect on the record of the conviction of larceny from the person. We further think that the justice of the case will be met by reducing by two months the term of each sentence, and as there was this element of unsatisfactoriness, the Court thinks that the sentences should run from the date of conviction.

Sentences reduced.

J. N. F.

GEORGE HUGHES.

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The Court disapproves of a sentence to imprisonment with hard labour for a longer term than twenty-four months.

Appeal against sentence.

Appellant was convicted at the Middlesex Sessions, on 7th April, 1923, before the Chairman, of housebreaking and of common assault, and was sentenced to twenty months' imprisonment with hard labour and six months' imprisonment with hard labour, to run consecutively.

Appellant in person.

The Lord Chief Justice: In this case the consecutive sentences passed upon the appellant amount together to twenty-six months' imprisonment with hard labour. No doubt a Court has power to pass any number of consecutive sentences of imprisonment with hard labour provided that the indictments are sufficient for each particular sentence. Nevertheless it has become the practice not to pass consecutive sentences amounting to more than two years' imprisonment with hard labour.

In the case of *Goldstein*, 11 Cr. App. R. 27: 1914: c. q., Lord Reading C.J. said, "This Court thinks that when a prisoner is sentenced to two years' hard labour no consecutive sentence of further imprisonment with hard labour ought to be imposed"; and, in the opinion of this Court, the sentences in this case should be dealt with so that they do not amount in all to more than two years' imprisonment with hard labour. The sentences will therefore be, consecutively, eighteen months' hard labour for the housebreaking and six months' hard labour for the common assault.

Sentence reduced.

J. N. F.

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JOHN SEYMOUR.

The Court of trial cannot take cognisance of previous convictions unless they are duly proved by a witness, subject to cross-examination.

Appeal against sentence.

Appellant was convicted at the Liberty of Peterborough Sessions, before the Chairman, on 5th April, 1923, of larceny, and was sentenced to five years' penal servitude.

The appellant was not present.

The LORD CHIEF JUSTICE: No witness was called to give evidence of previous convictions so as to give the appellant the opportunity of cross-examining him. I do not say that it is the only way, but it is a fair way, to put a witness to previous convictions and character into the witness box, and his testimony is then subject to cross-examination. In this case a mere list of appellant's previous convictions was looked at.

Upon the whole, having regard to the appellant's record and the times elapsing between the various convictions, the Court thinks that the sentence may suitably be reduced to three years' penal servitude.

Sentence reduced.

J. N. F.

ALFRED CONEY.

When an allegation that a convicted prisoner is a habitual criminal is to be tried, no sentence should be imposed for the primary offence until after verdict on that allegation.

Appeal against sentence and application for leave to appeal against conviction as a habitual criminal.

Appellant pleaded guilty at the West Riding (Wakefield) Sessions on 10th April, before the Chairman, of housebreaking

and of being a habitual criminal, and was sentenced to three years' penal servitude and five years' preventive detention.

The appellant in person.

T. P. Perks for the Crown.

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The LORD CHIEF JUSTICE: The only question is whether it is necessary on all the facts that this appellant should be sentenced to preventive detention. The grounds stated in the notice were that appellant had been previously convicted as a habitual criminal and that he was an associate of thieves.

A word must be said upon the procedure which was followed at the trial—a procedure not such as is approved by this Court, nor followed in other Courts, and a procedure which ought not to be followed.

After the prisoner's plea of guilty to the charge of housebreaking, counsel for the prosecution said that there was a charge against the prisoner of being a habitual criminal, but that he could not proceed with that charge unless the Chairman first sentenced appellant to three years' penal servitude. Counsel for the prosecution then called witnesses with reference to appellant's previous convictions and character, and counsel for the appellant addressed the Court, putting forward reasons why he should not be sent to penal servitude. If that procedure is followed, the jury, and other jurors waiting in Court, may hear all that is relevant about a prisoner's antecedents given to enable the Court to decide whether a sentence of penal servitude should be imposed. All kinds of statements adverse to the prisoner and relevant to his punishment may be given in evidence in the presence of those who, on different and more limited grounds, may afterwards be called upon to decide whether he is a habitual criminal. Here no particular mischief was done, because the prisoner pleaded guilty; but the method is a faulty method and may be highly prejudicial to the accused. It is also a waste of time. It was never intended that the persons who, upon the particular grounds set out in the statute, might have to decide whether a prisoner was a habitual criminal, should have in their minds all the material necessary to enable a Court to decide whether a sentence of penal servitude should be imposed. In the case of *E. Turner,* 1910, 1 K. B. 346; 79 L. J. K. B. 176; 102

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L. T. Rep. 367; 74 J. P. 81; 22 Cox, C. C. 310; 54 S. J. 164; 26 T. L. R. 162; 3 Cr. App. R. 103: c. q., the question was asked, "Should the sentence on the first counts of the indictment have been given before the prisoner was placed on his trial as a habitual criminal?" and Channell J. said, "The Court is clearly of opinion that the answer is in the negative. The facts which are to be proved on the charge of being a habitual criminal are the same as those with reference to which the Court at a trial always desires information before passing sentence, and it is therefore impossible that the Legislature could have intended that sentence must be passed before those facts are inquired into." That is one aspect of the matter, and there are the other aspects also. In the present case it does appear that for three and a half years, notwithstanding a previous conviction as a habitual criminal, this appellant successfully endeavoured to lead an honest life, and it does not necessarily follow as matter of course that, because a man is found or admits that he is a habitual criminal, he must be sentenced to preventive detention, especially where the whole gravamen of the charge is that he has been previously convicted as such. Looking at the appellant's efforts to lead an honest life, the Court thinks that the sentence of three years' penal servitude ought to stand, but that there was not sufficient reason to add the sentence of five years' preventive detention, and therefore the Court quashes that sentence.

Sentence of preventive detention quashed.

J. N. F.

ERNEST WILSON.

Sentence for attempted suicide.

Application for leave to appeal against sentence.

Applicant was convicted at the Middlesbrough Borough Sessions on April 6th, 1923, before the Recorder, of attempted suicide, and sentenced to twelve months' imprisonment with hard labour.

Roche J. refused leave to appeal.

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BRANSON J.: This applicant was kept in prison nine weeks waiting trial, and considering the length of the sentence following the time he had already been in custody, we think it is a case in which leave to appeal should be given in order to see whether any alteration should be made in the sentence.

Leave to appeal granted.

J. N. F.

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Appellant in person.

The Court thought that it was in appellant's interest that the sentence should not be decreased.

Appeal dismissed.

J. N. F.

ALBERT EDWIN YOUNG.

Applicants for leave to appeal, after such leave has been refused, should not repeat the statement they have made to the single judge.

Application for leave to appeal against sentence.

Applicant was convicted at the Hertfordshire Sessions on 9th April, 1923, before the Chairman, of burglary and garage-breaking, and sentenced to five years' penal servitude.

Applicant was not present.

THE LORD CHIEF JUSTICE: There are two observations which the Court has to make. In the first place, it appears that in each indictment the appellant is charged with stealing, and, after specifying certain chattels, the indictment adds, "and other articles." It was observed in *Yates*, 15 Cr. App. R. 15: 1920: c. q., that an expression such as that is quite improper. The articles should be described in detail.

The second observation is that this applicant has thought it right to submit a statement containing a quantity of matter to this Court, matter which is a mere repetition of what was said to the judge who refused his application. It was said in the case

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of *Piggott*, 15 Cr. App. R. 35: 1920, "We notice in this Court that there is a tendency on the part of applicants who wish to appeal to this Court from the decision of a judge refusing leave to appeal, to send in a statement which is frequently a mere repetition of the statement that has been made to the judge and considered by him. That statement is useless, because the statement made to the judge is already before the Court, and the only value of sending in a further statement is where there is additional matter or new matter which the applicant wishes to bring before the Court."

It is unfortunate that the indictments exhibit the blemish I have mentioned, but in view of the applicant's record there is no reason to interfere with the sentence passed.

Application refused.

J. N. F.

RICHARD REDMOND THIBEAUDEAU TAGGART.

Sentence varied in view of youth and previous good behaviour.

Appeal against sentence.

Appellant was convicted at the Yorkshire (Northallerton) Sessions on 5th April, 1923, before the Chairman, of obtaining money by false pretences, and was sentenced to nine months' imprisonment in the second division.

G. Streatfield for the appellant, who was not present.

C. Paley Scott for the Crown.

The LORD CHIEF JUSTICE: It is not practicable, and if practicable it would not be desirable, to lay down a general rule, but there are many cases in which it is worth while to take some risk in order to save a young man or a young woman from prison and the consequences of imprisonment. In this case we think it right to strain a point to save this youth from the perils which may follow even from a sentence in the second division. Looking at all the circumstances, the appellant's antecedents, his

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chances of leading an honest life, and the medical report upon him, the Court thinks that this is a case which may suitably be dealt with under the Probation of Offenders Act, 1907. We think it expedient, therefore, to release the appellant on probation. Before the order for his discharge is made, the appellant must enter into a recognisance in the sum of £20 to be of good behaviour for a period of three years, and to come up for judgment if called upon, and his uncle must enter into a recognisance in the same amount, and we make it a condition that the appellant be under the supervision of that gentleman during that period. The recognisances should be sent to the Registrar of this Court, and, if they are in order, directions will be given for the appellant's discharge.

Sentence varied.

J. N. F.

Solicitors for the Appellant—*Messrs. Collyer-Bristow & Co.*, Agents for *Messrs. Stone & Symonds*, Wirksworth.

JAMES REGINALD SMITH.

If on an indictment for larceny and receiving the jury return only a verdict of the latter, without sufficient evidence to constitute that offence, the Court will, on a review of the whole facts, substitute a verdict of the former charge.

Appeal against conviction.

Appellant was convicted at the West Bromwich Sessions on 27th April, 1923, before the Recorder, of knowingly receiving stolen property, and was sentenced to three months' imprisonment with hard labour.

H. H. Maddocks for the appellant (under s. 10 of the Criminal Appeal Act), who was present. Appellant was convicted of receiving a boat-hook valued 5*s.*: there were two counts—the first for larceny, and the second for receiving. In this case appellant was seen to take the boat-hook from the flat where it was kept and he handed it to a witness. There was no evidence of receiving. He referred to *Langmead*, 9 Cox, C. C. 464: 1864.

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The Crown must prove that the goods are stolen before they can convict of receiving, and the jury say that the appellant did not steal it.

Donald Hurst for the Crown. The jury in finding the appellant guilty of receiving must have been satisfied of facts, from which they ought to have found a verdict of larceny.

He referred to *Cooper,* 24 T. L. R. 867; 1 Cr. App. R. 88: 1908; *W. Taylor,* 1911, 1 K. B. 674; 80 L. J. K. B. 311; 75 J. P. 126; 27 T. L. R. 108; 6 Cr. App. R. 12.

I ask the Court under s. 5 (2) of the Criminal Appeal Act to substitute a verdict of guilty of larceny.

[The LORD CHIEF JUSTICE: A verdict the jury refused to find.]

Yes.

The LORD CHIEF JUSTICE: It is clear that the jury, in coming to the conclusion they did, were convinced that appellant must have had possession and control of property recently stolen, and though it is quite true that they might have found the appellant guilty of larceny and not of receiving, they chose to find him guilty of receiving. On the facts it is evident that the conviction for receiving cannot stand, and the question is whether, in the circumstances, this Court should substitute a verdict of guilty of larceny under s. 5 (2) of the Criminal Appeal Act, 1907. That sub-section says: "Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the Court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

There was some confusion with reference to the flat from which the boat-hook was taken and to the question whether there was one flat or more, and the jury may have misunderstood.

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We have no doubt, however, that the appellant was guilty of larceny, and the verdict to which the jury came shows that they were satisfied of facts which showed that he was guilty of larceny. Once the verdict of the jury shows to this Court that they were satisfied of such facts, this Court can substitute a verdict of larceny, and the Court in this case substitutes a verdict of guilty of that offence, the sentence already imposed to stand.

Verdict of larceny substituted.

J. N. F.

WALTER ROSE.

If the Court is of opinion that while a prisoner is serving a term an outstanding charge against him could properly have been tried, it will not permit the indictment therefor to be prosecuted after his term has expired.

Appeal against sentence.

Appellant was convicted at the Middlesex Sessions on 7th April, 1923, before the Chairman, of larceny, and was sentenced to five years' penal servitude.

The facts appear from the judgment.

J. W. Morris for the appellant (under s. 10 of the Criminal Appeal Act), who was present.

W. Higgins for the Crown.

The LORD CHIEF JUSTICE: This appellant pleaded guilty at Middlesex Sessions to a charge of stealing a clock, and he was sentenced to five years' penal servitude. He now appeals against that sentence, and it is to be observed that a second indictment for larceny, to which the appellant pleaded not guilty, was ordered to remain on the file. With regard to the charge upon which the appellant pleaded guilty, the facts very shortly were that upon the afternoon of the 26th of February the verger of a church in Wood Green saw the appellant leaving the church (the church being at the time open) and the appellant was carrying a parcel. The verger went to the church and missed a clock, which was valued at £2, from the wall, and he thereupon went after the appellant, who was still carrying the parcel, and caught

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him up. The verger took the parcel which contained the clock, and a police constable was called and the appellant was taken into custody. On being searched, there were found upon him thirty-eight keys, two screwdrivers, a pair of pliers and two pairs of gloves.

The appellant is sixty-seven years of age, and has been previously convicted nineteen times. It is not necessary that I should review those convictions, which go back to the year 1890, and include some sentences of penal servitude and more than one sentence of police supervision. His last sentence, however, was passed in October of 1921, when he was sentenced at Birkenhead Sessions to twelve months' imprisonment for housebreaking. From serving that sentence he was released on the 19th of August, 1922, which was just six months before the commission of the offence which he admitted.

With regard to the second indictment, the facts, so far as one can ascertain them, appear to be these. It is an indictment for a larceny alleged to have been committed on the 11th of April, 1921, and it would appear that the existence of that charge was brought to the knowledge of the learned Recorder at Birkenhead.

Higgins. If I may intervene, my Lord, it was not mentioned to the Recorder. The prisoner would not admit it, and for that reason it was not mentioned.

The LORD CHIEF JUSTICE: Very well. I do not say that the prisoner admitted it: I say that the fact was mentioned.

Higgins. No, it was not mentioned to the Recorder at all.

The LORD CHIEF JUSTICE: Then I leave out that matter. Although the indictment had to do with the charge said to have been committed on the 11th of April, 1921, it is said, and of course the Court accepts the statement, that it was not brought to the knowledge of the learned Recorder at Birkenhead when he sentenced the appellant in October, 1921. But when the appellant had gone to prison to serve the sentence which he then received, the police do not appear to have made any attempt then to proceed upon that indictment.

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Now it has been laid down again and again by this Court—and even within my personal recollection on several occasions during the past fourteen months—that the police, if they wish to proceed with such a charge, should proceed with it with all due speed—in the present case, while the appellant was serving the sentence passed at Birkenhead. That that is the correct course, and is obviously the only humane course, apart from circumstances of a special and peculiar character, was laid down clearly in the circular of the Home Office of 1906, and it has been approved again and again by this Court. What happened in the present case, as far as can be ascertained, is this. The police do not appear to have taken any proceedings at all upon or with reference to that indictment until after the appellant was arrested for larceny of the clock. The depositions relating to the larceny of the clock were taken on the 27th of February and on the 9th and 16th days of March. The depositions in the case relating to the alleged offence of the 11th of April, 1921, were not taken till the 16th of March of this year, and at the sessions and in his notice of appeal the appellant complains that in the course of his life he has many times in the past been arrested upon leaving prison and been charged with offences committed before he went to prison. At the sessions he asked again and again, sometimes by implication and once in the clearest terms, that this second indictment, going back to April, 1921, should be tried. It was not tried. It was ordered to remain upon the file, and it was said that the appellant could not be arrested on that charge without leave of the Court. What is the authority for that statement I do not know. At any rate, the appellant was not tried upon that indictment. A plea of not guilty was not accepted, and once more, therefore, there remains a charge upon which this man may be proceeded against at the conclusion of the sentence which he is to serve. This Court in these circumstances directs that that second indictment be never proceeded with. With regard to the sentence of five years' penal servitude, we think upon the whole that it may suitably be reduced to a sentence of three years' penal servitude.

Sentence reduced.

J. N. F.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE AVORY AND MR. JUSTICE BRANSON.

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ALFRED GREY.

Severity of sentence in view of a long interval without conviction.

Appeal against sentence.

Appellant was convicted at the Central Criminal Court on 19th April, 1923, before the learned Commissioner, of silvering coin, and was sentenced to three years' penal servitude.

Appellant was not present.

The LORD CHIEF JUSTICE: This appellant was convicted on an indictment which charged him (1) with silvering six farthings to make them look like sixpences, (2) with filing farthings, and (3) with possessing six counterfeit sixpences. It appears from the shorthand note that there was a misapprehension on the part of the learned Commissioner that the short sentences which appellant had previously undergone had continued up to the time of this offence. In fact, when one looks at the record of his previous convictions, one sees that there were some short sentences between 1908 and 1913, and that there was then an interval from 1913 to 1922 during which there were no convictions. In 1922 the appellant was sentenced to three months' imprisonment, and another three months' imprisonment (concurrent) for false pretences. The appellant also takes the point that between 1914 and 1919 he was in the army and from 1919 to 1920 in the Defence force, and it was on account of this statement that the learned judge who heard appellant's application thought that the sentence required consideration. In these circumstances the sentence of three years' penal servitude seems to have been imposed under a misapprehension of fact, and this Court reduces it to one of twelve months' imprisonment with hard labour.

Sentence reduced.

J. N. F.

FREDERICK SHAW.

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Avory J.
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Conviction quashed owing to misdirection confusing various dates and allegations in the indictment.

Appeal against conviction.

Appellant was convicted at the Birmingham City Sessions on 2nd May, 1923, before the Recorder, of housebreaking, and was sentenced to three years' penal servitude.

L. Morgan May for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present.

G. C. Lewis for the Crown.

The Lord Chief Justice: This appellant was indicted with a man named Hayes upon an indictment containing four counts. The first count charged them with housebreaking and larceny, the second count with receiving the property stolen, the third count charged them with larceny of a magneto, and the fourth count with receiving the magneto. In the result, it would seem, appellant was convicted on counts one and two, and acquitted on the other two charges, while Hayes was convicted on counts three and four, and acquitted on the first two counts. But the matter is left to speculation and conjecture because of what happened when the jury returned to Court. In reply to questions they said that they found appellant guilty upon the first "charge," and Hayes guilty upon the second "charge." The charges, however, were not two in number, but four. Two things were crucial in this case: (1) to keep the various dates and charges distinct, and (2) to keep the case against one prisoner distinct from the case against the other prisoner. It is quite clear that both dates and persons were allowed to become—to say the least of it—confused. It is admitted by counsel for the Crown to-day that there was no evidence against the appellant except that on the 14th March a jemmy was found, marks on which were said to correspond with marks on the door broken in, and it is contended that there is evidence that appellant was in possession of that jemmy on 27th February, the date of the offence, because it was found on the 14th March in a room which had been occupied by the appellant

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and another person from 5th March. Evidence was given with reference to tests made to compare the jemmy with the marks on the door. Nothing could be more unsatisfactory, where the instrument is of a kind to make a mark itself, than to put it into a mark and then to say that the two things fit. Here it is not clear that the jury did not convict the appellant for having in his possession a pedometer which was not stolen and was not in his possession. The case is unsatisfactory, and in the opinion of this Court there was no evidence on which appellant could be convicted of the offences of which he appears—though the altered indictment still leaves a doubt—to have been convicted.

Conviction quashed.

J. N. F.

JOHN HARTLEY.

Habitual criminal.
Severity of sentence.

Appeal against sentence.

Appellant was convicted at the Middlesex Sessions on 5th May, 1923, before the Chairman, of larceny in a dwelling-house, and of being a habitual criminal, and was sentenced to three years' penal servitude and eight years' preventive detention.

Appellant in person.

A. Bryan for the Crown.

The LORD CHIEF JUSTICE: This appellant pleaded guilty to three indictments charging him with larceny in a dwelling-house, and to a further indictment charging him with being a habitual criminal. Some other offences were also taken into consideration. He has been convicted no fewer than twenty times, and in 1913 at Chester was sentenced to three years' penal servitude and ten years' preventive detention, from which he was released in June, 1919. He then went to Burnley, and earned an honest living as a shoemaker for three years until June, 1922. He has to serve

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a *remanet* of preventive detention of more than three years, and in view of his age and all the facts, and especially the fact that he tried successfully for three years to carry on business honestly as a shoemaker, the Court thinks that he should not serve the new sentence of preventive detention. He will have to serve the sentence of three years' penal servitude, and some portion at least of the *remanet*.

Sentence of preventive detention quashed.

J. N. F.

BEFORE

MR. JUSTICE SANKEY, MR. JUSTICE SALTER AND MR. JUSTICE SWIFT.

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BARNETT HAMMER.

In s. 15 of the Administration of Justice Act, 1920 (10 & 11 Geo. 5, c. 81, the words "any action or other matter . . . . tried by a judge with a jury" include a criminal trial, and any question of foreign law thereat is for the judge and not for the jury.

To prove a Jewish marriage it is not necessary to produce the (Hebrew) written contract.

Appellant was convicted of bigamy at the Central Criminal Court on June 6th, 1923, before the Recorder; a certificate was granted on a point of law, sentence was postponed.

The marriage was a Jewish one, before two Rabbis, at Lipscarri in Bessarabia (then Russian territory, now Roumanian) in 1907. The second ceremony was in 1917, at the Registrar's office, St. Pancras. The wife and a woman present at the marriage in 1907 proved the first ceremony. The father of the bigamous wife proved the 1917 ceremony. A detective proved the arrest and defendant's statement admitting the first ceremony but disputing its validity. The Recorder, after expert evidence on Russian law, left the case to the jury, who convicted. He postponed sentence and gave certificate for leave to appeal.

S. J. Duncan, for the appellant, who was not in custody, submitted that the prosecution had not proved its case, as *Horn* v. *Noel,* 1 Camp. 61: 1807; *Althausen,* 17 Cox, C. C. 630: 1893; and *Nasillski,* 61 J. P. 520: 1897, showed that evidence must also be given of a written contract (*sic, Kethubah*) between the parties.

F. J. Newman, for the Crown, submitted that *Althausen* and other cases following it were wrongly decided. All these cases derived their authority from *Horn* v. *Noel.* That case was

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defended on ground of coverture. A Jewish marriage was proved by the evidence of two witnesses, whereupon plaintiff's counsel objected that a written contract between the parties must also be proved. The defendant's counsel then put in the written contract, and Lord Ellenborough, who tried the case, non-suited the plaintiff. The case, therefore, did not decide the point taken by appellant, as objection was taken, but it was not argued. *Lindo* v. *Belisario*, 1 Hag. Con. 227: 1795, did decide that a written contract was *not* necessary. He submitted that *Horn* v. *Noel* was a mere legal curiosity, as it decided nothing, and all the other cases cited by counsel deriving their efficacy from *Horn* v. *Noel* must be overruled.

[He was stopped.]

SANKEY J. cited the Administration of Justice Act, 1920, s. 15.

Duncan submitted that the section applied to criminal matters.

Newman that it did not, as the Act, save for s. 4, dealt only with civil matters, as shown by its other sections and long title; it repealed many Acts all dealing with civil matters, none with criminal. The words of s. 15, "action or other matter" showed it dealt with civil actions, "matter" being *ejusdem generis* with "action," and "action" meaning a civil proceeding begun by writ. There was no definition of "action or other matter" in the Act itself, and therefore one must use the Act as its own dictionary; "action or other matter" was also used in s. 2, a section which curtailed the right to trial by jury. If "action or other matter" in s. 15 comprised criminal matters, so did the same words in s. 2, and the Legislature could not have intended such a revolutionary result as to leave a question of fact and the decision of guilt or innocence of an accused in the hands of a judge alone.

[SALTER J.: S. 2 dealt with High Court actions.]

Newman. The Central Criminal Court is a branch of the High Court. See Judicature Act, 1873, ss. 16, 29.

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Sankey J.

SANKEY J.: In this case the prisoner, a member of the Jewish race, was indicted for, and found guilty at the Central Criminal Court, of bigamy, but the learned Recorder respited judgment and gave a certificate that the case was a fit one for appeal.

The allegation against the prisoner was that he was married on the 22nd May, 1907, at Lipscarri, Bessarabia, at that time within the Empire of Russia, and that subsequently, and while to his knowledge his wife was alive, he went through the ceremony of marriage in England upon the 5th day of May, 1917. The only point taken by the defence was that the first marriage had not been properly proved, and two contentions were advanced:—

(1) That it was necessary to produce a written contract proving the alleged marriage.

(2) That there was no evidence of the said marriage fit to be left to the jury in the absence of any document purporting to bear the signature of the official Rabbi, or purporting to be endorsed by the municipal authority.

(1) The learned judge was referred to several cases tried at the Central Criminal Court, where, in *Althausen* (above), the learned Recorder held that the production of a written contract was necessary, and in *Nasillski* (above), where the learned Common Serjeant followed the same ruling. Both learned judges founded their decision upon the case of *Horn* v. *Noel* (above), which came before Lord Ellenborough in the year 1807, and the defence contended that Lord Ellenborough decided that the proof of a written contract of marriage was necessary to prove a Jewish marriage. We think that this is a misconception. The case in Campbell is not an authority for any such proposition. All that took place there was that the learned counsel, Mr. Garrow, suggested that a written contract ought to be produced, and his opponent had it. It was put in and the case proceeded. No decision was given.

In our view the validity of a marriage under Jewish and Russian law is a question of fact, and there was ample evidence upon which the marriage could be held valid, notwithstanding the absence of a written contract.

(2) With regard to the second contention, the learned judge held that the question of foreign law was one for the jury, and experts in Russian law were called on either side. The jury

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accepted the evidence on behalf of the prosecution that the facts deposed to by them proved that the marriage at Lipscarri was a valid one, and it being further proved that the prisoner had gone through the ceremony of marriage in 1907, brought in a verdict of guilty.

Unfortunately the attention of the Court was not called to the Administration of Justice Act, 1920, 10 & 11 Geo. 5, c. 81, s. 15, which provided that the question of foreign law shall be decided by the judge. S. 15 is as follows:—

"Where, for the purpose of disposing of any action or other matter which is being tried by a judge with a jury in any Court in England or Wales, it is necessary to ascertain the law of any other country which is applicable to the facts of the case, any question as to the effect of the evidence given with respect to that law shall, instead of being submitted to the jury, be decided by the judge alone."

It was argued by the Crown, on appeal, that this section did not apply to criminal law, and that a criminal prosecution could not be included in the words "any action or other matter." It was pointed out that these words are used in s. 2 of the Act, which obviously can only refer to civil proceedings, and that the words must have the same meaning in s. 15, and that this latter section therefore could only refer to civil cases.

We think that the words as used in s. 15 are wide enough to include, and must be held to include, a criminal prosecution.

It will be observed that the Act itself is entitled the Administration of Justice Act; s. 2 refers to matters in the High Court, s. 3 to matters in the County Court, s. 5 to matters in the Admiralty Court, s. 9 to the enforcement in the United Kingdom of judgments obtained in British Courts in other British Dominions.

All these sections specifically apply to the subject-matter referred to in them. S. 15 is in Part 3 of the Act, under the title "Miscellaneous," and, as above pointed out, the words are very wide and general in their character, and we do not think they can be cut down by reference to similar words used in other parts of the Act with respect to particular subject-matters.

Nor do we think it possible to construe the words under discussion by reference to meanings assigned to them or to similar words by the Legislature in other and different statutes.

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For example, it is provided by the Judicature Act, 1873, 36 & 37 Vict. c. 66, s. 100, that action means a civil proceeding, and shall not include a criminal proceeding by the Crown.

Again, it has been held that the words "legal proceedings" in the Vexatious Actions Act, 1896, 59 & 60 Vict. c. 51, do not include criminal proceedings, see *In re Boaler*, 1914, 1 K. B. 122; 83 L. J. K. B. 139; 1915, 1 K. B. 21; 83 L. J. K. B. 1629; 111 L. T. R. 497; 30 T. L. R. 580; 58 S. J. 634; 24 Cox, C. C. 335.

The meaning of the words as used in the Act under discussion must be derived from a consideration of the words themselves, from a consideration of the place they occupy in the statute, and from a consideration of the statute as a whole.

It would be a strange result if in a civil case foreign law was for the judge, and in a criminal case for the jury.

It is not difficult to postulate circumstances where the same question of foreign law would arise in a matter which was first decided in a civil Court and subsequently came on in a criminal Court; in which event, if the construction contended for by the prosecution is correct, in the first of the two cases the foreign law would be for the judge, and in the second of the two cases the foreign law would be for the jury. A construction leading to such a result cannot, we think, be placed upon the section in question.

We are therefore of opinion that it was for the learned judge to decide what the foreign law with reference to the alleged marriage at Lipscarri was, and he has not done so, but it has been decided by the jury, who have no right to do so. We at first thought that we ought to hold that there had been no trial, and that a *venire de novo* ought to be ordered, on the authority of *Crane*, 1921, 2 A. C. 299; 90 L. J. K. B. 1160; 125 L. T. R. 642; 85 J. P. 245; 65 S. J. 642; 37 T. L. R. 788; 27 Cox, C. C. 43; 15 Cr. App. R. 183. We, however, think that that case is distinguishable on the ground that the prisoner there was never in peril at the first so-called hearing. In the present case the indictment was valid, the prisoner was given in charge to the jury upon it, and was in peril of being convicted thereon, but there was an illegality in the proceedings, viz., that the question of foreign law was not decided by the judge, but was decided by the jury.

In these circumstances we feel that we have no alternative but to quash the conviction.

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BARNETT HAMMER.

Sankey J.

Conviction quashed.

J. N. F.

Solicitors for the Appellant—*Messrs. Pilgrim and Phillips.*

EDWARD FITZGERALD, DUKE OF LEINSTER.

9 *July.*

Application for bail.
The general rule of the Court is to refuse bail to prospective appellants.

The applicant was convicted at the Central Criminal Court on July 3rd, 1923, after a four days' trial, before the Recorder, of obtaining credit without disclosing that he was an undischarged bankrupt, and sentence was postponed. He was granted a certificate of appeal.

Comyns Carr for the applicant, who was not present. I ask for bail for the applicant pending the hearing of the appeal against his conviction. The learned Recorder did not take a serious view of the offence, and ordered applicant to be detained at Brixton Prison until the next sessions of the Central Criminal Court, which commence on July 16th, and said that he would then release applicant. The appeal on certificate cannot be heard till to-day fortnight, so that the result would probably be, unless bail is granted. that applicant will have finished his term of detention before his appeal is heard. I do not think the learned Recorder had power to admit to bail.

[SWIFT J.: Supposing this Court does not quash the conviction, what is to be done if he is now released on bail?]

The applicant could be then detained for the number of days he had been released on bail.

[SALTER J.: Pending the hearing of the appeal the learned Recorder might continue to postpone sentence.]

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EDWARD FITZGERALD, DUKE OF LEINSTER.

Sankey J.

SANKEY J.: This Court has frequently laid down that it will not grant bail unless there are exceptional and unusual reasons, *Gordon*, 7 Cr. App. R. 182: 1912; *Gott*, 16 Cr. App. R. 86: 1921; *Wise*, 17 Cr. App. R. 17: 1922; and there are no such reasons in this case, and the Court will not grant this application.

Application dismissed.

J. N. F.

Solicitors for Applicant—*Appleton & Co.*

LEWIS JAMES GODDARD.

Severity of sentence.

Appeal against sentence.

Appellant was convicted at the Central Criminal Court on 1st June, 1923, before the Recorder, of making a false statement for insertion in a marriage register contrary to s. 3 (1) (b) of the Perjury Act, 1911, 1 & 2 Geo. 5, c. 6, and was sentenced to twelve months' imprisonment with hard labour.

Appellant in person. I was acquitted of bigamy. I had not seen my wife for ten years, and I could not sign the register without making a false statement, although I was not making a bigamous marriage.

SANKEY J.: This appellant, in signing the marriage register, described himself as a bachelor. He had previously been convicted a number of times, but never before for a case of this character. Since his last conviction he had obtained and done honest employment. This Court, while not saying this is a small offence, has come to the conclusion that the sentence is too severe, and thinks it proper to substitute a sentence of three months' imprisonment with hard labour.

Sentence reduced.

J. N. F.

BEFORE

MR. JUSTICE AVORY, MR. JUSTICE SANKEY AND MR. JUSTICE SALTER.

YENDECHENO MOHAMED SAIDE KAKELO.

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18 *June.*

On a prosecution under the Aliens Order, 1920, the Order need not be produced unless its absence is objected to by the defence.

Under the Aliens Restriction (Amendment) Act, 1919 (9 & 10 Geo. 5, c. 92), and the principal Act (1914), the onus *is on the defendant of proving that he is not an alien.*

There is nothing in either of those Acts to make any offence under them indictable.

Application for leave to appeal against conviction and sentence.

Applicant was convicted at the London Sessions on 12th April, 1923, before the Deputy-Chairman, of obtaining credit under false pretences or by fraud, and also of making a false declaration contrary to Article 18 (4) (B) of the Aliens Order, 1920, and was sentenced to six months' imprisonment in the second division, and recommended for expulsion.

A. C. Caporn for the applicant, who was not present. Applicant claims to be and represented himself as the Prince of Khurdistan. No evidence was called to prove that his statements were untrue, and there was no evidence that any credit was obtained by any pretence which has been proved to be fraudulent.

In regard to the charge under the Aliens Order, I submit there no evidence was called that applicant was an alien; the order was not produced in evidence, and it is not clear that an offence under the order is an indictable offence.

SANKEY J.: There was ample material on which the jury could come to the conclusion to which they did on the charges of obtaining credit by false pretences or fraud, and it would have been extraordinary if they had come to any other result, and no

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leave will be granted to appeal against the conviction on those charges.

With regard to the third ground of appeal, namely, whether applicant ought to have been convicted of the offence against the Aliens Order, the Court grants leave to appeal, and does not intend to say anything on that matter now.

Application granted.

BEFORE

MR. JUSTICE SANKEY, MR. JUSTICE SALTER AND MR. JUSTICE SWIFT.

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25 & 26 *June.*

YENDECHENO MOHAMED SAIDE KAKELO.

The facts appear sufficiently from the judgment.

A. C. Caporn for the appellant, who was present, cited *Bennington* v. *Huddleston*, 1921, unreported; *Duffin* v. *Markham and Another*, 82 J. P. 281: 1918.

E. Percival Clarke for the respondents referred to *The King* v. *Graham Campbell, Ex parte Moussa*, 1921, 2 K. B. 473; 90 L. J. K. B. 818; 125 L. T. Rep. 310; 85 J. P. 189; 19 L. G. R. 461; 37 T. L. R. 611; 26 Cox, C. C. 747; *Friedman*, 10 Cr. App. R. 72: 1914; *Waller*, 1910, 1 K. B. 364; 79 L. J. K. B. 184; 102 L. T. R. 400; 74 J. P. 81; 54 S. J. 164; 26 T. L. R. 142; 22 Cox, C. C. 319; 3 Cr. App. R. 213; *Knowlden and Others* v. *Regina*, 33 L. J. M. C. 219; 5 B. & S. 532; 10 Jur. N. S. 1177; 10 L. T. R. 691; 12 W. R. 957; 9 Cox, C. C. 483: 1864; *Fuidge*, 33 L. J. M. C. 74; L. & C. 390; 10 Jur. N. S. 160; 9 L. T. R. 777; 12 W. R. 351; 9 Cox, C. C. 430: 1864; *Heane*, 33 L. J. M. C. 115; 4 B. & S. 947; 10 Jur. N. S. 724; 9 L. T. R. 719; 9 Cox, C. C. 433: 1864.

10 *July.*

SANKEY J. read the following judgment:—

The appellant arrived in London from New York in March last, and describing himself as the Prince of Kurdistan, went first to the Savoy and then to the Hyde Park Hotel and stayed several days at each, leaving without paying his bill. He further bor-

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YENDECHENO MOHAMED SAIDE KAKELO.

Sankey J.

rowed money from one of the hotel managers, and hired motor cars without paying. Shortly afterwards he was arrested and tried at the London Sessions, and convicted on five counts of an indictment which charged him with obtaining credit by fraud under the Debtors Act, and with making a false statement contrary to Article 18 (4) (B) of the Aliens Order, 1920.

He was sentenced to six months' imprisonment in the second division, and was recommended for deportation.

He applied for leave to appeal against conviction and sentence, but in respect of the counts for obtaining credit by fraud such leave was refused.

He was, however, granted leave to appeal against his conviction for the offence under the Aliens Order, and on the case coming on, three points were taken on his behalf. It was said—

(1) That there was no proof given of the Aliens Order itself.

(2) That there was no proof given that the prisoner was an alien.

(3) That the offence under the Aliens Order was punishable by summary conviction, and that the Sessions had no jurisdiction to entertain the indictment.

(1) That there was no proof of the Aliens Order; reliance was placed upon *Bennington* v. *Huddleston* (unreported), recently decided by a Divisional Court. In that case there was a prosecution before the justices under a Motor Car Order, and it was objected at the hearing that there was no proof of the order itself.

The magistrates stated a case on the point.

The Court held that the objection being taken in the Court below it was incumbent upon the prosecution to produce the order, and that, as they had not done so, the case must go back in order to give the prosecution an opportunity of putting themselves in order. We think that case wholly inapplicable to the present circumstances.

In the case now before us no such point was taken by the defendant at the trial. We are of opinion that it is a point which ought to have been taken by him if he wished to rely upon it. Had it been taken there can be no doubt that the order would have been forthcoming immediately, or within a very short time. In the circumstances of this case it is too late to take this point for the first time on appeal.

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Sankey J.

(2) There being no proof that the prisoner was an alien. It was contended on his behalf that the allegation that he was an alien was set out in the count of the indictment, and therefore it was incumbent upon the prosecution to prove it. The argument was as follows:—It was admitted that by the Aliens Act, 1914, s. 1, sub-s. 4, in respect of cases under orders made in pursuance of such Act, it was expressly enacted that the proof that the person charged was not an alien was upon the person alleging that he was not an alien, but it was said that the Act only applied during a state of war, or during some national emergency; that this was clear from the Aliens Amendment Act of 1919, which did not re-enact s. 1, sub-s. 4, and that therefore the *onus* remained upon the prosecution to prove that the prisoner was an alien. We think that this point is wholly misconceived.

It will be observed that the 1914 Act was not repealed by the 1919 Act; in fact, by the terms of the 1919 Act, both Acts are to be read as one. The 1919 Act repealed that part of the 1914 Act which says that the provisions of the Act were only to be applied in cases of war or national emergency, but we can nowhere find in the 1919 Act any express provision, or, indeed, any intention to repeal s. 1, sub-s. 4 of the 1914 Act, and reading the two Acts together we come to the conclusion that that sub-section still remains, and has not been repealed.

We therefore are of opinion that the *onus* was upon the appellant to prove that he was not an alien, and not upon the prosecution to prove that he was.

Further, we think that the burden of proof may in the course of a case be shifted from one side to the other, and in considering the amount of evidence necessary to shift the burden of proof, the Court has regard to the opportunity of knowledge with respect to the fact to be proved which may be possessed by the parties respectively. (See Digest of the Laws of Evidence (Stephen), 9th ed. Art. 96.)

In this case there was evidence given by the prosecution sufficient to shift the *onus* of proof, and to make it necessary for the prisoner to prove that he was not an alien.

(3) That the offence under the Aliens Order was punishable by summary conviction, and that Sessions had no jurisdiction to entertain the indictment.

This depends upon the Aliens Restriction Act, 1914, s. 1,

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sub-s. 2, and s. 13, sub-s. 4 of the Aliens Restriction (Amendment) Act, 1919, which is as follows:—

"A person who is guilty of an offence against this Act shall be liable on summary conviction to a fine not exceeding one hundred pounds, or to imprisonment, with or without hard labour, for a term not exceeding six months, or, on a second or subsequent conviction, twelve months, or, in either case, to both such fine and imprisonment."

The law upon the subject is elaborately dealt with in the case of *The Queen* v. *Hall*, 1 Q. B. D. 747; 17 Cox, C. C. 278: 1891, which was a motion to quash an indictment charging one Hall, an overseer of the poor for the parish of St. Mary, Whitechapel, with a misdemeanour. The motion succeeded upon the ground that an offence by an overseer within the meaning of s. 51 of the Parliamentary Registration Act, 1843, was not an indictable misdemeanour. The learned judge, after referring to a passage in Hawkins's Pleas of the Crown, Book 2, chap. 25, s. 4: "where a statute makes a new offence which was no way prohibited by the common law, and appoints a peculiar manner of proceeding against the offender as by commitment, or action of debt, or information, &c., without mentioning an indictment, it seems to be settled at this day that it will not maintain an indictment, because the mentioning the other methods of proceeding only seems impliedly to exclude that of indictment," [Leach's edition] went at length through the cases bearing on the matter.

We think that the law is that where a statute renders acts punishable for the first time, if the statute contains no general prohibition, such acts cannot be prosecuted by indictment unless that mode of trial is prescribed, but can only be prosecuted in the manner which the statute directs. There are certain statutes which, while prescribing a summary penalty, expressly preserve the right to prosecute by indictment, as, for example, the Dentists Act, 1878, 41 & 42 Vict. c. 33, ss. 34, 35; The Merchandise Marks Act, 1887, 50 & 51 Vict. c. 28, s. 2, sub-s. 3.

The question for determination here is, in which category the statutes under discussion fall.

It is to be observed that the remedy by indictment is not specifically preserved, nor are we able to hold that either the Aliens Restrictions Act, 1914, or the Aliens Restriction Act of 1919 contains a general prohibition. It is enacted by s. 13, sub-s. 1

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of the latter Act, that a person acting in contravention of the Act shall be guilty of an offence against the Act, and sub-s. 4; that a person who is guilty of an offence against the Act shall be liable on summary conviction to a fine not exceeding 100*l*., or imprisonment with or without hard labour for a term not exceeding six months. We are of opinion that these statutes fall within the doctrine above quoted, and that all offences against them, or orders made under them, are only punishable in the manner prescribed by the statutes, viz., on summary conviction.

We have not lost sight of the fact that under s. 17 of the Summary Jurisdiction Act, 1879, 42 & 43 Vict. c. 49, it is always open to a person charged before the Court of Summary Jurisdiction with an offence entailing such a penalty as the offence alleged to have been committed by the defendant in this case, to claim a right to be tried by jury, a right of which the Court must inform him. In the event of his claiming the right he is triable on indictment before a jury, and so on his own election turns the offence into an indictable one.

No claim was, however, put forward by the prisoner in this case. The matter was treated as an indictable one before the magistrate and before the Sessions. We are of an opinion that it was not an indictable offence, and that the conviction at the Sessions must be quashed. We do not propose to interfere with the recommendation for deportation, which the Court had the right to make upon the conviction of the appellant on the counts of the indictment relating to obtaining credit by fraud, for on a consideration of all the circumstances we think such recommendation should be upheld.

Conviction for making a false statement quashed.

J. N. F.

Solicitors for Appellant—*Lloyd, Richardson & Co.*

Solicitors for Respondent—*Wontner & Sons.*

The Court (Darling, Sankey and Swift, JJ.) also sat on July 13th, and on July 16th (Darling, Salter and Swift, JJ.).

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23 *July.*

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE SALTER AND MR. JUSTICE SWIFT.

GEORGE MOORE.

The Court only grants an extension of time for appealing in exceptional cases.

Application for extension of time for leave to appeal against conviction and sentence.

Applicant, who was not present, was convicted at the County of London Sessions on 16th May, 1923, before the Deputy-Chairman, of being in possession of housebreaking implements by night, and was sentenced to twenty-three months' imprisonment with hard labour.

SALTER J.: This applicant is five weeks beyond the proper time for appealing, and gives no reasons except that he was ignorant of the time within which he must apply, and that he could not afford the expense of appealing. The rules regarding appealing, and the fact that he does not require money to do so, are brought to the notice of every prisoner, *Pitman*, 12 Cr. App. R. 14: 1916, and want of means is no ground for extending the time in which to appeal.

Application dismissed.

J. N. F.

WILLIAM JOSEPH JAMES.

Leave to appeal against sentence granted with a view to increasing the term.

Application for leave to appeal against sentence.

Applicant, who was not present, was convicted at the Stamford Borough Sessions on 4th July, 1923, before the Recorder, of

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23 *July.*

Swift J.

WILLIAM JOSEPH JAMES.

shopbreaking, and was sentenced to twelve months' imprisonment with hard labour.

SWIFT J.: In view of the applicant's record the Court thinks the sentence too lenient, and leave to appeal is granted with a view to the imposing of an adequate sentence.

Application granted.

J. N. F.

ALFRED JOHN HARRISON.

The rule must be rigidly observed that counsel must only address the jury once when an undefended prisoner gives evidence, but calls no other witness.

Appeal against conviction and sentence.

Appellant was convicted at the Durham Sessions on 25th June, 1923, before the Deputy-Chairman, of obtaining money by false pretences, and was sentenced to four months' imprisonment with hard labour.

A. S. Diamond for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present.

R. S. Stewart for the Crown.

SALTER J.: There is one point that arises in this case: counsel for the Crown addressed the jury a second time, after the appellant, who was undefended, had given evidence. That course is irregular and cannot be justified. *Thomas,* 17 Cr. App. R. 34: 1922. We have, however, to consider whether any miscarriage of justice took place, and in this case we do not think there was any such miscarriage, but we desire to point out very clearly that the rule about counsel in such circumstances not addressing the jury a second time is one which ought to be carefully observed, and it might be that in another case this Court would have to hold that a conviction, in a trial where such an irregularity occurred, must be quashed.

Appeal dismissed.

J. N. F.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE McCARDIE AND MR. JUSTICE SWIFT.

GEORGE LOVELL.

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27 *July*

On an application for leave to appeal against sentence the Court may, proprio motu, *give leave to appeal against the conviction if it appears that the appellant has made a mistake.*

Application for leave to appeal against sentence.

Applicant was convicted at the Durham Assizes on 6th July, 1923, before Greer J., of indecent assault, and sentenced to eighteen months' imprisonment with hard labour.

W. Hedley for the applicant, who was not present.

[THE LORD CHIEF JUSTICE: Do you know whether applicant meant to apply for leave to appeal against conviction?]

I do not think so, but I do not know. He strenuously denied the offence.

[THE LORD CHIEF JUSTICE: There appears to be a probability that the wording of the form, which is not the form now generally used, misled the applicant, and that he may have thought he was applying for leave to appeal against conviction. If you desire to appeal against conviction, the Court is prepared to allow this application to be treated as an application for leave to appeal against conviction.]

I do wish to appeal against conviction.

[McCARDIE J.: What corroboration was there?]

In my submission there was none, unless a complaint by the girl to a Mrs. Fleming is held to be corroboration.

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GEORGE LOVELL.

Hewart L.C.J.
McCardie J.
Swift J.

[SWIFT J.: How does that corroborate the girl's story? If I repeat a thing twice, the fact that I say it a second time does not corroborate my original statement.]

I agree. At most it is evidence of consistency. In this case the learned judge directed the jury properly, but went on to say that there was corroboration.

SWIFT J. referred to *Rudge*, 17 Cr. App. R. 113, above; and MCCARDIE J. to *Baskerville*, 1916, 2 K. B. 658; 86 L. J. K. B. 28; 115 L. T. 453; 80 J. P. 446; 60 S. J. 606; 12 Cr. App. R. 81.

I submit that sentence was severe in view of applicant's character.

SWIFT J.: In this case applicant was charged with rape and indecent assault. He was found not guilty of rape, and was convicted of indecent assault on three occasions. He gave notice of appeal, which on the face of it is an appeal against sentence, but it appears clear that he intended to appeal against conviction.

There is no ground for giving leave to appeal against sentence. The girl was a servant in his house; he was convicted of indecently assaulting her on three occasions, and there is nothing to show that the learned judge had taken into consideration anything he should not have done, or omitted to take into consideration anything he should have done, and this Court will not interfere with a sentence unless it is shown that the learned judge who imposed a sentence has gone wrong in either of those ways in principle.

In regard to the conviction, it is urged that there was no corroboration. The learned judge warned the jury that corroboration was desirable, and then went on to say that there was corroboration. In the circumstances we think there is a case to be fully argued, and we give leave to appeal against conviction.

Application for leave to appeal against conviction granted.

Application for leave to appeal against sentence refused.

Solicitors for Applicant—*Kenyon & Son,* Agent for *J. Murray Aynsley,* Consett.

J. N. F.

See p. 163.

ARTHUR WILLIE WHITELEY.

1923
27 *July.*

Charges against a person serving a term of imprisonment should be prosecuted during that term as soon as may be.

Applications for leave to appeal against sentences.

Applicant, who was not present, was convicted at the West Riding (Leeds) Sessions on 2nd July, 1923, before the Chairman, of shopbreaking and larceny, and sentenced to nine months' imprisonment with hard labour. He was also convicted at the Huddersfield Borough Sessions on 5th July, 1923, before the Recorder, of housebreaking, and sentenced to twelve months' imprisonment with hard labour.

The Lord Chief Justice: The question is raised whether these sentences are to be concurrent. It is clear that they are intended to be concurrent. It is also clear that there remain upon the file charges against this applicant. As has been often said before, those charges, if they are to be proceeded with, should be dealt with at once while applicant is in prison. Nothing is more unsatisfactory than that charges should be kept hanging over the head of a prisoner, and that on release he should be made to take his trial for offences known to have been committed before his imprisonment began.

Applications refused.

J. N. F.

WALTER DANIELS.

See George Lovell, *p.* 163, *below.*

Application for leave to appeal against conviction.

Applicant was convicted at the Chester Assizes, on 11th July, 1923, before Bailhache J., of carnal knowledge of a girl under the age of sixteen years, and was sentenced to eighteen months' imprisonment with hard labour.

Applicant was not present.

McCardie J.: Applicant was convicted of carnal knowledge of a girl under sixteen. The girl was applicant's stepdaughter,

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27 *July.*

WALTER v. DANIELS.

McCardie J.

and it was alleged by the girl that while applicant's wife was away from home he had connection with her, and again later on in July last after the wife had returned home. The facts of the case were very unusual. Substantially the only evidence against the applicant was that of the girl. She admitted that she had told lies and that she was dishonest and stole, and the learned judge who tried the case said that she seemed to prefer to tell a lie to the truth. The applicant left his wife and went off to Canada with another woman. On arrival there he was rejected by the immigration authorities and sent back to this country. While he was away the girl first made a complaint. The only corroboration was the evidence of the woman who went to Canada with applicant, and who told of a conversation she had overheard between applicant and his wife in which applicant said that he had once slept with the girl, but had not had connection with her. We have come to the conclusion that leave to appeal should be granted in this case, so that the question of corroboration and whether evidence becomes corroborative when it is evidence of the girl's complaint should be fully argued.

Application granted.

J. N. F.

BEFORE

MR. JUSTICE DARLING, MR. JUSTICE SHEARMAN AND MR. JUSTICE BRANSON.

30 & 31 *July.*

ALEXANDER CAMPBELL MASON.

The Court leans against hearing fresh evidence.

Appeal against conviction, and application for leave to call further evidence.

Appellant was convicted at the Central Criminal Court, on 14th July, 1923, before Swift J., of murder, and sentenced to death.

At the trial the appellant accused one Vivian, the principal witness for the prosecution, of having committed the crime.

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30 & 31 *July.*

ALEXANDER CAMPBELL MASON.

Darling J.
Shearman J.
Branson J.

A. C. Fox-Davies, for the appellant, who was present, desired to call a number of witnesses to give further evidence, including a Miss Stewart to give evidence of a destroyed letter said to have been written to her by appellant before his arrest stating that Vivian had committed the murder, the prosecution having commented on the fact that appellant had disclosed no such defence at the police court, and having suggested that it was thought of afterwards.

The Governor of Wandsworth Prison was called, and, under the order of the Court, produced a number of documents taken from appellant after his conviction. They included a number of letters to and from Miss Stewart.

Sir Richard Muir (*H. D. Roome* and *W. B. Purchase* with him), for the Crown, called attention to the decisions in *Weisz,* 15 Cr. App. R. 85: 1920; *Starkie,* 1922, 2 K. B. 275; 91 L. J. K. B. 663; 86 J. P. 74; 66 S. J. 300; 38 T. L. R. 181; 16 Cr. App. R. 61, on the question of the calling of witnesses who were already known to the defence.

The Court declined to hear the witnesses whom appellant desired to call.

DARLING J., after dealing with the facts: It is now really asked that there should be a new trial, which this Court is not empowered to order, and that we should hear certain witnesses whose names have been mentioned, and then consider the whole of the trial in the light of that new evidence. This Court exercises with very great caution the power given it to hear fresh evidence because to do so is opposed to the old established, trusted and cherished institution of trial by jury. This Court has to be convinced of very exceptional circumstances before it will reconsider the verdict of a jury in the light of fresh evidence which has not been laid before the jury, and which, in some cases, might have been put before the jury at the trial.

There is nothing in the suggested new evidence of the witnesses to cause the Court to hold what would be a retrial. There is one important matter. It was said that it was not a fact that the defence of the appellant was not thought of until after the police court proceedings, but had been thought of all along, and that before his arrest he had sent a letter to a Miss Stewart accusing Vivian of the crime, which letter Miss Stewart had

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ALEXANDER CAMPBELL MASON.

Darling J.

destroyed. We have had produced to the Court a number of letters to and from Miss Stewart, and if there was such a letter it is quite inconsistent with the letters we have seen.

We also think it unnecessary to call Miss Stewart, as her evidence would only go to prove that appellant set up his defence three weeks earlier than he undoubtedly did.

Appeal dismissed.

J. N. F.

Solicitor for the Appellant—*R. H. Blinkhorn.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER AND MR. JUSTICE SWIFT.

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13 *August.*

GEORGE ARTHUR BAGLEY.

Lodging is not a "chattel, money or valuable security" within s. 32 of the Larceny Act, 1916, 6 & 7 Geo. 5, c. 50.

Application for leave to appeal against sentence.

Applicant, who was not present, was convicted at the Derbyshire Sessions, on 18th July, 1923, before the Chairman, of false pretences, and sentenced to twenty-one months' imprisonment with hard labour.

The LORD CHIEF JUSTICE (in dismissing the application): It is to be observed that the count in the indictment for obtaining food and lodging by false pretences is wrongly drawn. Lodging is not a chattel, money or valuable security within s. 32 of the Larceny Act, 1916, 6 & 7 Geo. 5, c. 50.

Application dismissed.

J. N. F.

THOMAS HAY.

1923
13 *August.*

Severity of sentence.

Application for leave to appeal against sentence.

Applicant, who was not present, was convicted at the Hampshire Sessions, on 24th July, 1923, before the Chairman, of embezzlement, and sentenced to six months' imprisonment with hard labour.

Leave to appeal was granted, and the case was dealt with later in the day.

SALTER J.: In this case appellant was employed for nearly three years as a dairyman, and after he left his place it was found that he had committed small embezzlements. He is forty-eight years of age and his previous character was very good. The Court considers the sentence too heavy, and it is reduced to one of one month's imprisonment with hard labour.

Sentence reduced.

J. N. F.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SALTER, AND MR. JUSTICE SWIFT.

GEORGE LOVELL.

Evidence of complaint made by the prosecutrix alleging a sexual offence is not properly called corroboration. In such cases the true rule for the direction of the jury is laid down in Lillyman, 1896, 2 *Q. B.* 167.

See p. 15, above.

R. F. Burnand for the appellant, who was not present. The substantial ground of appeal is misdirection by the learned judge at the trial. The story of the girl stands alone and without cor-

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roboration, and I submit it was the duty of the learned judge to warn the jury that the evidence of persons to whom she complained was evidence of the consistency of her story and not evidence of corroboration. He did not give such a warning.

[The LORD CHIEF JUSTICE: The warning of the necessity of corroboration ought to be given, and if the learned judge says that that is corroboration which is in fact not corroboration the value of the warning is taken away?]

Yes, and I submit evidence of a complaint is not corroboration.

[SWIFT J.: Corroboration must be independent evidence. A person cannot corroborate herself.

SALTER J.: Suppose someone else gave evidence of a complaint, of complainant running to her, crying, clothes torn?]

That would be evidence corroborating the story, but not of necessity implicating the accused.

There must be corroboration implicating the accused. *Lillyman*, 1896, 2 Q. B. 167; 65 L. J. M. C. 195; 74 L. T. R. 730; 44 W. R. 650; 60 J. P. 536; 18 Cox, C. C. 346; *Osborne*, 1905, 1 K. B 551; 74 L. J. K. B. 311; 69 J. P. 189; 92 L. T. R. 393; 53 W. R. 494; 21 T. L. R. 288; *Crocker*, 128 L. T. R. 33; 17 Cr. App. R. 45, 46: 1923; *Rudge*, 17 Cr. App. R. 113: 1923, were cited. The learned judge did point out the danger of relying only on the evidence of the assaulted person, but he went on to say that here there was corroboration, viz., the complaint to others.

Sir Richard Muir (*Paley Scott* with him) for the Crown. The judge warned the jury not to convict without corroboration, and I submit there was conduct by the prisoner which might be considered corroboration. The more important question is what is meant by corroboration.

[The LORD CHIEF JUSTICE: Is it usual to say that statements by complainant are corroboration?]

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Yes. I will cite cases, but one does not wish to argue this case on a mere form of words.

In the case of an accomplice it must be corroboration in some particular implicating the accused. The rule was set right in *Baskerville*, 1916, 2 K. B. 658; 86 L. J. K. B. 28; 115 L. T. R. 453; 80 J. P. 446; 60 S. J. 696; 25 Cox, C. C. 524; 12 Cr. App. R. 81. But in this case it is not the evidence of an accomplice, and I submit the learned judge here was not using the word corroboration within the meaning put upon it in *Baskerville's* case.

There are no decisions that in such a case as this corroboration must be in a particular implicating the accused, while there are many decisions to the contrary.

The warning about corroboration is given in the case of the evidence of accomplices and in the case of the evidence of persons injured by sexual offences, persons who are victims, not accomplices; but there is a different origin, history and reason for the warning.

It is said in Hale's Pleas of the Crown (1800), Vol. I. p. 633: "The party ravished may give evidence on oath, and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact that concur in that testimony.

"For instance, if the witness be of good fame, if she presently discovered the offence, made pursuit after the offender, showed circumstances and signs of the injury, whereof many are of that nature, that only women are the most proper examiners and inspectors, if the place, wherein the fact was done, was remote from people, inhabitants or passengers, if the offender fled for it; these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself."

It is sufficient corroboration if there is any fact proved by independent testimony that tends to show the jury that the woman is speaking the truth. All that is required from a judge is that the jury should be warned that there should be some fact given in evidence by an independent witness to show that the woman is speaking the truth. *Hedges*, 3 Cr. App. R. 262: 1909; *Graham*, 74 J. P. 246; 4 Cr. App. R. 218: 1910; *Smith*, 14 Cr. App. R. 74 and 81: 1919.

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Burnand in reply.

The LORD CHIEF JUSTICE: In this case the appellant George Lovell was convicted of indecently assaulting Alice Crowther on the 30th March, the 4th April and the 13th April of this year, and he was sentenced to eighteen months' imprisonment with hard labour.

Originally the appellant applied for leave to appeal against sentence, but it became clear to the Court that in all probability he had been misled by the terms of a particular form upon which his notice of application was made, and, therefore, while the Court was of opinion, and expressed the opinion, that the sentence called for no revision if the conviction was right, the appellant ought in the circumstances to have the opportunity of appealing against the conviction. It is that appeal which to-day has been argued.

The story which was told at the Assizes was that the appellant was a married man, some thirty-eight years of age; that he was living with his wife; that the girl was just eighteen years old and was employed as a domestic servant in the appellant's house, and, apart from him and his wife, was the only other inmate of the house. It is not necessary to recapitulate the circumstances leading up to the charges, originally of rape and of indecent assault, against the appellant; it is enough to say that the learned judge was of the opinion and directed the jury that it was not safe to convict upon the charge of rape, and that the jury ultimately convicted the appellant of all three offences of indecent assault.

Now there are two grounds upon which the appeal against conviction is based; upon analysis they really prove to be one ground, and it may shortly be stated in this way: That this conviction ought to be quashed because the learned judge, although he gave a correct warning to the jury about the expediency at any rate of seeking corroboration in such cases, made an error in point of law by afterwards describing once, twice and thrice as corroborative evidence the fact that the girl had complained of what the appellant had done, and the contents of her complaint.

The law with regard to complaints of this kind is, one would think, sufficiently clear. The difficulty is not to see what it is, but in all cases to apply it. In the case of *Lillyman*, 1896, 2 Q. B. 167, it was laid down that, "Upon the trial of an indictment for rape, or other kindred offences against women or girls, the fact

that a complaint was made by the prosecutrix shortly after the alleged occurrence, and the particulars of such complaint, may, so far as they relate to the charge against the prisoner, be given in evidence on the part of the prosecution, not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as negativing consent on her part." Mr. Justice Hawkins, delivering the judgment of the full Court, consisting of Lord Russell of Killowen, Baron Pollock, Mr. Justice Hawkins, Mr. Justice Cave and Mr. Justice Wills, said, at page 170 of the report, with regard to such evidence: "It is necessary, in the first place, to have a clear understanding of the principles upon which evidence of such a complaint, not on oath, nor made in the presence of the prisoner, nor forming part of the *res gestæ*, can be admitted. It clearly is not admissible as evidence of the facts complained of: those facts must therefore be established, if at all, upon oath by the prosecutrix or other credible witness, and, strictly speaking, evidence of them ought to be given before evidence of the complaint is admitted. The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness box, and as being inconsistent with her consent to that of which she complains." And again at page 178 the learned judge added: "It has been sometimes urged that to allow the particulars of the complaint would be calculated to prejudice the interests of the accused, and that the jury would be apt to treat the complaint as evidence of the facts complained of. Of course, if it were so left to the jury they would naturally so treat it. But it never could be legally so left; and we think it is the duty of the judge to impress upon the jury in every case that they are not entitled to make use of the complaint as any evidence whatever of those facts, or for any other purpose than that we have stated." Those words, in the opinion of this Court, clearly state the legal position. The matter was considered further in the year 1905 in *Osborne* [above]. In that case the child who was said to have been indecently assaulted was under the age of thirteen years, and, therefore, consent was immaterial, and the question was whether in those circumstances evidence of statements made by her was admissible, and it was held that such evidence was admissible, not as evidence of the truth of the charge alleged, but upon the grounds referred to in the judgment in

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Lillyman. It is quite true, if one looks at particular passages in the judgment in *Osborne*, it might seem, as far as mere words are concerned, as if the judgment went beyond the judgment in *Lillyman*. But that is probably not the correct view. When, for example, the words are used, as they are at page 561 of the report, "corroborative of the complainant's credibility," nothing more is really meant than what is spoken of in *Lillyman* in the words: "The consistency of the conduct of the prosecutrix with the story told by her in the witness box."

Now in a case of this kind, that is to say, a case in which the charge is indecent assault, it is not suggested that corroboration of the story of the prosecutrix is essential, but it is the practice to warn juries against acting upon the uncorroborated testimony of the woman or the girl.

Reference may be made to the case of *John Alexander Graham* [above], where Mr. Justice Channell, delivering the judgment of the Court, said: "It is one of those cases in which the judge should explain that the burden of proof is upon the prosecution to make out the case to the satisfaction of the jury; that it is dangerous to act upon the evidence of one person, and in which the judge should point out to the jury that they had one person saying one thing and another person another thing." Mr. Justice Channell added that the judge in that case "pointed out the risk of acting on the evidence of the girl, unless corroborated; and at the same time he explained that strictly speaking the law did not require that her evidence should be corroborated, and that if they believed the girl's evidence they could act upon it." In the present case it is not contended, or at any rate I think it is not seriously contended, that the learned judge did not give to the jury the proper warning. But what is said is that, after telling the jury in suitable terms what it was their duty to do, he went on to describe as corroboration that which is not in the strict sense corroboration. It may be that hereafter, if and when a suitable opportunity occurs, this Court will have to consider with care what exactly is the meaning of that corroborative testimony without which, in such a case as this, it is right to point out to a jury the risk of acting upon the evidence of the prosecutrix. But, having regard to the judgment of this Court in *Hedges's* case [above] and in *Graham's* case [above], it is not possible for us to say that the summing up in this case, because it

used the words "corroborative evidence," is such as to amount to a misdirection. There is a clear distinction between matters which affect the intrinsic credibility of the witness's own story when that story is considered by itself, and, on the other hand, corroborative evidence in the sense of independent testimony proceeding from a source other than the prosecutrix and implicating the accused; and it may be that sometimes the distinction between those two things has not been kept clearly in view. Historically, as Sir Richard Muir has pointed out in the cases he has cited and in the passages he has read from Hale's Pleas of the Crown, in sexual cases the fact of complaint by the prosecutrix was admitted, not so much as new matter tending to support a story sufficient in itself, but rather as an indispensable ingredient in the story of the prosecutrix, without which the story of the prosecutrix would be open to grave suspicion. Historically, that appears to be the origin of the admissibility of evidence of this kind, and in the opinion of the Court the right direction is that which is given in the case of *Lillyman* in the passage already referred to.

In this case the fact and the particulars of the girl's complaints are, it is true, referred to under the name "corroboration," but that word is also used in *Hedges's* case and *Graham's* case, and a particular passage in *Osborne's* case, and in the opinion of this Court it did not mislead the jury. If it had been intended to convey that the fact and the particulars of the girl's complaints were evidence of the facts complained of it would clearly have been a misdirection.

The summing up does not appear so to have treated those matters, nor to have been likely to convey that impression. Hereafter, as I have said, the matter may call for further consideration, but, in view of the decisions to which the attention of the Court has been directed, it is not possible to say that this summing up was so wrong as to lead to the conclusion that the conviction ought to be quashed.

At the same time, it is the opinion of the Court, and it cannot be made too plain, in cases of this character, that complaints made by the girl or the woman are not evidence of the facts complained of, but are only matters that may be taken into account by the jury when they are considering the consistency, and, therefore, the credibility of the story which the woman or the girl tells.

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In these circumstances the appeal is dismissed, and as leave was given the usual consequences will follow.

Appeal dismissed.

J. N. F.

Solicitors for Appellant—*Kenyon & Sons*, Agents for *J. Murray Aynsley*, Consett.

WALTER DANIELS.

See p. 159, above.

Trevor-Lloyd for the appellant, who was present.

Sir R. Muir for the Crown was not called upon.

Appeal dismissed.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE ROCHE AND MR. JUSTICE BRANSON.

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15 *October.*

JOHN WILLIAM HIBBERT.

Mitigation of sentence on a youthful first offender.

Appeal against sentence.

Appellant was convicted at the Rochester City Sessions on the 24th September, 1923, before the Recorder, of larceny, and was sentenced to three years' detention in a Borstal institution.

The appellant appeared in person.

The LORD CHIEF JUSTICE: This appellant, who is seventeen and a half years of age, pleaded guilty to an indictment charging

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JOHN WILLIAM HIBBERT.

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him with stealing two bicycles. There are no previous convictions against appellant, but for several years up to the age of fourteen he was in an industrial school because of the difficulty of controlling him.

The Governor of Maidstone Prison reports that he does not appear to be of criminal tendencies, and his employer is willing to take him back. In these circumstances the Court thinks it right to give this young man another chance. The Court, therefore, will take two steps: the first to bind over the appellant in his own recognisances for two years, and the second to place him under the supervision of the probation officer of the Rochester district. He must comply with the orders of that officer.

Sentence reduced.

J. N. F.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE SALTER.

ROBERT ALFRED SHEPPARD.

16 & 17
October.

An accused person cannot put in evidence documents referring to the charge written by him after his arrest merely because they are in his own favour. But, semble, *the prosecution may.*

Application for leave to appeal against conviction.

Applicant was convicted at the Central Criminal Court, on 20th September, 1923, before Swift J., of murder, and sentenced to death.

G. L. Hardy for the applicant (under s. 10 of the Criminal Appeal Act, 1907), who was present, asked leave to add to the grounds of appeal, the application having been drawn up by applicant himself.

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[THE LORD CHIEF JUSTICE: It is not desirable to allow further grounds of appeal to be added, and the Court has to be firm in this matter; but as this is a capital offence and the notice of appeal was drawn up by the applicant himself, the Court will take an exceptional course and allow these further grounds to be argued, but it is to be understood that it is an exceptional course.]

G. L. Hardy. There are two real points: one that the verdict was against the weight of the evidence, and that the learned judge was wrong in refusing to admit certain letters. Applicant made on 7th July a statement of his innocence; on 9th July he confessed there was a "suicide pact" between him and the deceased woman; there were in all five statements—four of innocence and one of guilt, and he had previously at Reading when arrested on a charge of burglary confessed to a murder, with which he was found to have had nothing to do.

The prosecution proposed to read certain letters written by the accused after he was in custody, but the learned judge inclined to the view that the prosecution should not put them in. I submit that this was a mistake on the part of the learned judge.

[SALTER J.: Your argument is that the rules about evidence are the same in regard to statements made before and after arrest. Any relevant statement by a party is evidence, whether for or against?]

Yes.

[SALTER J.: Is it not the duty of the prosecution to put all the facts before the Court?

THE LORD CHIEF JUSTICE: Is there not a difference between statements made in reply to a charge and statements made otherwise?]

If it is on the subject of the crime, whether it is material is for the jury and not for the judge. Anything a man says or writes after arrest on the subject of the charge can be given in evidence.

The prisoner did not go into the box, and called no evidence.

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Travers Humphreys (*E. Fulton* with him) for the Crown. I submit that no person can produce as evidence statements by him in his own favour made after the commission of the offence. On the other hand, any voluntary statement relevant to the charge made by an accused person at any time may be put in by the prosecution as part of its case, whether the statement tends in favour of or against the accused. In this case the statements were subsidiary; the real strength of the case was not the statements. There was a cord round the woman's neck, which, according to the medical evidence, could not have been tied by deceased, and no explanation was given regarding it.

[The LORD CHIEF JUSTICE: Was there ever a stage in the trial when you offered the letters in evidence?]

No. The discussion took place during my opening, and in deference to the view of the learned judge I withdrew the proposal to prove and put in the letters.

[The LORD CHIEF JUSTICE: And the defence could not.]

Clearly not.

The Court decided to see the letters and adjourned for their production and proof.

17th October. The letters or copies were produced, proved and read.

G. L. Hardy in reply.

The LORD CHIEF JUSTICE, after dealing with the facts: It was said on behalf of applicant that the verdict was against the weight of the evidence. That means that there was no evidence on which a jury could convict. That contention obviously could not be maintained; the evidence was not only sufficient, but ample to show that applicant was guilty of murder, for there was evidence of the belt being tied and of the method of tying, and,

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apart from the question of the suicide agreement (*a*), it is clear that applicant was present and assisting the deceased woman to commit the act.

But it is also said that there were letters which, if read to the jury, might have produced an effect in prisoner's favour and that they ought to have been produced and were not. When one looks at the transcript one finds that it is a fact that the learned counsel for the prosecution had thought it right to offer to put in evidence certain letters, written by the applicant after arrest, which letters the latter could not put in, though the prosecution could, and that the learned judge refused to allow those letters to be read. It may be a matter for argument whether those letters were in fact excluded, but it is a matter of little importance as we have had the letters read, and, in the opinion of this Court, if the documents had been put in, the effect must have been to confirm in the minds of the jury the opinion they had formed that the applicant was present and assisted in bringing about the death of the deceased woman. To put it at the highest, the reading of the letters could not have done more than to introduce into the minds of the jury a doubt whether any statement of the applicant could be believed.

In these circumstances, and having carefully considered all the materials in the case, this Court upon grounds of law sees no reason to interfere with the verdict of the jury.

Application dismissed.

J. N. F.

(*a*) The Court did not deal with the law in this class of case: there is a report of a similar case (*Symonds*) in this Court in the *Times* newspaper of December 19, 1922, not reported elsewhere.

BEFORE

MR. JUSTICE SANKEY, MR. JUSTICE SALTER AND MR. JUSTICE GREER.

LESLIE JOSEPH MINTER.

1923
19 *October.*

Frivolous applications.

Application for leave to appeal against conviction and sentence.

Applicant was convicted at the Leeds Assize, on 16th July, 1923, before the Lord Chief Justice, of uttering a forged document and attempting to obtain goods by false pretences, and was sentenced to sixteen months' and twelve months' imprisonment, the sentences to run concurrently.

The applicant was not present and no counsel appeared.

SANKEY J., in dismissing the application, said: This applicant applied to a single judge shortly before the long vacation for leave to appeal, which was refused. During the long vacation only one Court of Criminal Appeal sat, at which court his application could not then be heard; but he persisted in this application though he was warned of the fact that the consequence might be that his sentence would commence from the date when his application was heard.

This Court might in a proper case allow the sentence to date from an earlier date than that on which the application is heard, but in this case we consider that it ought not to do so. It is a wholly frivolous application, and the applicant has a bad record. The Court will therefore make no order about the sentence commencing at an earlier date, and therefore it will run from to-day, which means that about thirteen weeks are added to the term imposed upon him at the trial.

Application dismissed.

J. N. F.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE SALTER.

22 *October.* 1923

EDWARD FITZGERALD, DUKE OF LEINSTER.

The obligation on an undischarged bankrupt seeking credit to the amount of ten pounds or more within s. 155 *of the Bankruptcy Act,* 1914, *to disclose the fact of his being undischarged is absolute.*

See p. 147, above.

On July 16th defendant was bound over in his own recognisance of 250*l.* at the Central Criminal Court and was not in custody.

At the trial the learned Recorder put the following questions to the jury:—

(1) Did the defendant obtain credit from Straker-Squire, Ltd.?—Yes.

(2) Did the defendant inform them or their agent that he was an undischarged bankrupt?—No.

(3) Did Straker-Squire, Ltd., or their agent in fact know before giving credit to the defendant that he was an undischarged bankrupt?—The jury disagreed.

(4) Did the defendant know that Straker-Squire, Ltd. (or their agent), were (or was) in possession of that knowledge, if any?—No.

(5) Did the defendant instruct Fraser to inform Straker-Squire, Ltd., or their agent, that he was an undischarged bankrupt?—Yes.

(6) Did Fraser so inform them or their agent?—No.

(7) If not, did the defendant on reasonable grounds believe that Fraser had so informed them or their agent?—Yes.

In view of these answers, a verdict of guilty was entered.

S. 155 of the Bankruptcy Act, 1914, 4 & 5 Geo. 5, c. 59, enacts: "Where an undischarged bankrupt (a) either alone or jointly with any other person obtains credit to the extent of ten pounds or upwards from any person without informing that

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person that he is an undischarged bankrupt . . . he shall be guilty of a misdemeanour."

Sir E. Marshall Hall, K.C. (*St. John Hutchinson* with him), for the appellant, who was not present. This is a criminal offence and not a quasi-criminal offence, and *mens rea* must be proved against appellant. His agent carried out all his negotiations, and the jury found that he had reasonable grounds for believing Straker-Squire, Ltd., had been informed.

He referred to *Sherras* v. *De Rutzen*, 1895, 1 Q. B. 918; 64 L. J. M. C. 218; 72 L. T. R. 839; 43 W. R. 526; 59 J. P. 440; 18 Cox, C. C. 157; 11 T. L. R. 369; *Toppen* v. *Marcus*, 1908, 2 I. R. 433.

In *Stonehouse* v. *Masson*, 1921, 2 K. B. 818; 91 L. J. K. B. 93; 125 L. T. R. 463; 85 J. P. 167; 37 T. L. R. 621, Shearman J. said "the *mens rea* consists in the intention to do the act prohibited by the statute," and appellant here has not been found to have had such an intention.

[SALTER J.: Here the forbidden thing is for an undischarged bankrupt to obtain credit of ten pounds or over.

The LORD CHIEF JUSTICE: The statute prohibits obtaining credit unless a certain step is taken.]

If it is the view of the Court that there is an absolute prohibition against the act without *mens rea* I cannot argue further.

Cecil Whiteley, K.C., and *J. P. Valetta* for the Crown were not called upon.

The LORD CHIEF JUSTICE: There is no doubt that appellant at the material time was an undischarged bankrupt, and that neither appellant himself nor any agent of his informed Straker-Squire, Ltd., or their agent of that fact, although the jury found that appellant had instructed his agent to inform them, and that he had reasonable grounds to believe that the agent had done so.

That sends one back to the words of the statute and the object of the statute. [His Lordship read the sub-section (above) and referred to *Monsell Brothers, Ltd.* v. *London and North Western*

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EDWARD FITZGERALD, DUKE OF LEINSTER.

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Railway Company, 1917, 2 K. B. 836; 81 J. P. 305; 15 L. G. R. 706.]

If the intention of the statute had been different it might have been differently worded, *e.g.*, with the word "fraudulently" in it. But it is not, and there is an absolute obligation on undischarged bankrupts to convey the information. If it were otherwise the section would be to a great extent nugatory. The manifest purpose of the statute is to make absolute the obligation of an undischarged bankrupt to disclose the fact. If that is not done, then whatever the state of the mind of the bankrupt, the offence has been committed. No doubt where a jury finds that the bankrupt has given instructions for the information to be conveyed, that fact may well be taken into account in assessing the punishment

The appeal must be dismissed.

Appeal dismissed.

J. N. F.

Solicitors for the Appellant—*Appleton & Co.*

HORACE CAVENDISH CHAPMAN.

Severity of sentence after a long interval since a conviction.

Appeal against sentence.

Appellant was convicted at the Middlesex Sessions, on 7th July, 1923, before the Deputy-Chairman, of larceny, and sentenced to twenty-three months' imprisonment with hard labour.

Appellant in person.

SANKEY J.: We recognise the difficulty a person once convicted has of obtaining an honest livelihood. This appellant has had no conviction for eleven years, and in the circumstances the Court thinks it is a proper case for a reduction of sentence, and substitutes one of twelve months' imprisonment with hard labour for the one of twenty-three months.

Sentence reduced.

J. N. F.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE SALTER.

HARRY KUTAS.
JAMES JERICHOWER.

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29 *October.*

A conspiracy to obtain goods by fraud is a misdemeanour within the meaning of "circumstances which amount to felony or misdemeanour" in s. 33 (1) *of* 6 & 7 *Geo.* 5, *c.* 50, *the Larceny Act*, 1916.

Appeal against conviction.

Appellants were convicted at the Central Criminal Court on 24th July, 1923, before the Common Serjeant, for receiving property in circumstances amounting to misdemeanour, and were each sentenced to twelve months' imprisonment in the second division; Kutas was also ordered to pay costs of the prosecution not exceeding £250.

The appellant Kutas, to whom appellant Jerichower was clerk, had obtained goods from one Simm at a price considerably less than Simm obtained them from the manufacturers, and so low that there was a presumption of guilty knowledge. Simm subsequently absconded still owing a large sum for the goods. One Hepden, clerk to Simm, had been convicted of conspiring with Simm to obtain the goods by fraud.

Travers Humphreys for the appellants, who were not present. The charge was framed under s. 33, sub-s. 1 of the Larceny Act, 1916, 6 & 7 Geo. 5, c. 50, which enacts: "Every person who receives any property knowing the same to have been stolen or obtained in any way whatsoever under circumstances which amount to felony or misdemeanour shall be guilty of an offence of the like degree (whether felony or misdemeanour)." The appellants were charged with the misdemeanour. It is submitted that there was no evidence on which the jury could convict. S. 33 of the Larceny Act, 1916, merely consolidates and simplifies ss. 91 and 95 of the Larceny Act, 1861, 24 & 25 Vict. c. 96, and the articles must have been obtained by a misdemeanour. In this

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case they were not so obtained, the earlier misdemeanour being a conspiracy by Simm and Hepden to obtain and not the obtaining of the goods. Unless there were some limitation, a person could be found guilty of receiving under this section whenever any misdemeanour had been committed, such as non-registration under the Registration of Business Names Act, 1916, 6 & 7 Geo. 5, c. 58, by the person who obtained them, if it could be in any way connected with the obtaining. Here there was no evidence that Simm obtained them by false pretences.

A. S. Comyns Carr and *I. G. Kelly* for the Crown, were not called upon.

The LORD CHIEF JUSTICE: Counsel for appellants has ably argued that there was really in this case no evidence of the offence alleged. That proposition depends upon the particular view taken of the section of the Act under which they were charged. Briefly, the argument is that s. 33, sub-s. 1 of the Larceny Act, 1916, purports to be and is no more than a consolidation and simplification of ss. 91 and 95 of the Larceny Act, 1861.

In s. 95 of the Larceny Act, 1861, the receiving must be of property the obtaining whereof "is made a misdemeanour by this Act"; these words are not in the Act of 1916, which says that the receiving of any property "obtained in any way whatsoever under circumstances which amount to a misdemeanour" shall be a misdemeanour—words much more comprehensive. Counsel for appellants would deprive those words of any real meaning at all. It was enough to show that the goods which appellants were charged with receiving with a guilty mind had been obtained in circumstances in which a misdemeanour had been committed; that is here, in circumstances which amounted to a conspiracy to defraud the vendors of the goods.

This point depending on a criticism of the statute fails.

Appeal dismissed.

J. N. F.

Solicitor for the Appellants—*H. S. Baron.*

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LUSH, AND MR. JUSTICE SANKEY.

GEORGE ARCHIBALD SMITH.

1923
12 *November.*

Charges which can conveniently be joined in one indictment should be so joined.

Application for leave to appeal against sentence.

Applicant, who was not present, was convicted on two indictments at the West Kent Sessions on 18th October, 1923, before the Chairman, of shopbreaking and office breaking, and was sentenced to two terms of twelve months' imprisonment with hard labour concurrently.

No counsel appeared.

The LORD CHIEF JUSTICE, in dismissing the application, said: One matter calls for observation. It is apparent that no attention was paid by those responsible for the prosecution to s. 4 of the Indictments Act, 1915, 5 & 6 Geo. 5, c. 90, which enacts that "subject to the provisions of the rules under this Act, charges for more than one felony or more than one misdemeanour, and charges for both felonies and misdemeanours, may be joined in the same indictment." Here, instead of one indictment, there was more than one, which was quite unnecessary and is a waste of public money.

Application dismissed.

J. N. F.

1923
12 *November.*

ALEXANDER FRASER.

By virtue of s. 5, sub-s. 1, of the Indictments Act, 1915, the Court of trial may amend an indictment under s. 32, sub-s. 1, of the Larceny Act, 1916, by inserting the words "with intent to defraud."

Appeal against conviction on certificate.

Appellant was convicted at the Middlesex Sessions on 5th October, 1923, before the Deputy-Chairman, of obtaining money by false pretences, and was sentenced to eighteen months' imprisonment with hard labour.

The grounds of appeal appear from the judgment.

H. W. Wickham for the appellant, who was present.

In *James*, 12 Cox, C. C. 127: 1871, Lush J. quashed an indictment for this offence because it omitted "with intent to defraud." As these words were "a material part of the indictment," he thought he had no power to amend under s. 1 of 14 & 15 Vict. c. 100. The Forms and Appendices to the Rules under the Act are obligatory, and Form 12 contains these words. The Grand Jury may have omitted them purposely on the facts of the case. In *Benson*, 1908, 2 K. B. 270, the C. C. C. R. ruled that "there is no power to make an amendment substituting one offence for another."

Vernon Gattie for the Crown was not called upon.

The Lord Chief Justice: The appellant was charged upon an indictment, containing seven counts, under s. 32 (1) of the Larceny Act, 1915, 6 & 7 Geo. 5, c. 50, which enacts: "Every person who by any false pretence with intent to defraud, obtains from any other person any chattel, money, or valuable security, or causes or procures any money to be paid, or any chattel or valuable security to be delivered to himself or to any other person for the use or benefit or on account of himself or any other person shall be guilty of a misdemeanour." In the indictment the words "with intent to defraud" were omitted, but it was otherwise in the form under the rules. Some discussion took place, and the learned Deputy-Chairman ordered it to be amended under s. 5, sub-s. 1

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ALEXANDER FRASER.

Hewart L.C.J.

of the Indictments Act, 1915, 5 & 6 Geo. 5, c. 90, which says: "Where, before trial, or at any stage of a trial, it appears to the Court that the indictment is defective, the Court shall make such order for the amendment of the indictment as the Court thinks necessary to meet the circumstances of the case, unless, having regard to the merits of the case, the required amendments cannot be made without injustice, and may make such order as to the payment of any costs incurred owing to the necessity for the amendment as the Court thinks fit."

The argument for the appellant assumes that such amendment can only be made before the indictment is found by the Grand Jury, but such argument is in entire disagreement with s. 5, sub-s. 2 of the Act, which says "where an indictment is amended, a note of the order of amendment shall be endorsed on the indictment, and the indictment shall be treated for the purposes of the trial and for the purposes of all proceedings in connection therewith as having been found by the Grand Jury in the amended form." There is no weight in the contention for the appellant. It was a case in which s. 5, sub-s. 1 of the Indictments Act, 1915, imposes a duty on the Court to amend the indictment. There was no injustice, and it would have been a failure of duty on the part of the Court if the amendment had not been made.

Appeal dismissed.

J. N. F.

Solicitor for the Appellant—*H. Percy Crowe.*

Solicitors for the Respondent—*Wontner & Sons.*

JAMES DUFFIN.

It is a misdirection, which is a ground for quashing a conviction, incorrectly to direct the jury that the defendant has in effect confessed the crime of which they convicted him.

Appeal against conviction and sentence.

Appellant was convicted at the Worcestershire Sessions on 15th October, 1923, before the Chairman, of common assault, and sentenced to twelve months' imprisonment with hard labour.

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JAMES DUFFIN.

Hewart L.C.J.
Lush J.
Sankey J.

E. A. Godson for the appellant (under s. 10 of Criminal Appeal Act), who was not present. Appellant was indicted for indecent assault and common assault on three girls, and the learned Chairman directed that the case against each girl should be tried separately. The jury convicted of common assault. The grounds of appeal are that there was no evidence of common assault and that there was misdirection by the Chairman in telling the jury that on his own evidence they must convict the appellant of common assault. (He was stopped.)

Erskine Simes for the Crown.

The LORD CHIEF JUSTICE: It has been admittedly frankly and properly by counsel for the Crown that the summing-up is one that cannot be supported. Unfortunately there was a misapprehension in the mind of the Court with the result that in the summing-up it omitted to give to the jury the direction which it should have done, and this Court has no alternative but to quash the conviction.

Conviction quashed.

J. N. F.

EDWARD LLOYD.

If a plea of guilty is wrongly recorded, the Court may award a venire de novo. Baker, 7 *Cr. App. R.* 217: 1912, *followed.*

Where by the error of the Court of trial a prisoner has been detained before trial for an unnecessarily long period, that period ought to be taken into account if he is convicted at the trial.

Appeal against conviction.

Appellant pleaded guilty, at the Surrey Sessions, on 16th October, 1923, before the Chairman, of entering a house with intent to commit a felony, and was sentenced to fifteen months' imprisonment with hard labour.

The appellant was charged upon an indictment with breaking and entering, and pleaded guilty to entering but not to breaking. That plea was entered on the indictment as a plea of entering only, but was treated as a plea of guilty generally.

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12 *November.*

EDWARD LLOYD.

Hewart L.C.J.
Lush J.
Sankey J.

V. M. Ruston for the appellant (under s. 10 of the Criminal Appeal Act), who was present.

A. H. King for the Crown. I have nothing to say in support of the conviction. I submit that the case should be sent back for trial. *Baker*, 28 T. L. R. 363; 7 Cr. App. R. 217: 1912.

[The LORD CHIEF JUSTICE: Was appellant ever in peril?]

No.

V. M. Ruston. There were five cases of false pretences which appellant wished the Court to take into consideration, but his application was refused, the Court saying that it could not do so as these charges were not similar to that of housebreaking. I submit that an order may be made for them to be taken into consideration should he be convicted, otherwise he might be arrested on release from prison and charged with those offences. I submit the one month's imprisonment already served should be taken into consideration if he is convicted.

The LORD CHIEF JUSTICE: This appellant was charged upon an indictment with breaking and entering a house with intent to commit a felony therein. Appellant said that he was guilty of the entering but not of the breaking, and that plea was entered on the indictment as a plea of guilty of entering only. The plea was, however, treated as a plea of guilty generally, and appellant was sentenced to fifteen months' imprisonment with hard labour. It is apparent that there was in fact no plea at all to the charge, and the proper course appears to be that taken in the case of *Baker* (above), and as was said in that case, "as the case stands, there was no plea of 'guilty' and therefore the sentence was informal. The case must go back, and the prisoner must be asked to plead again to the indictment, and the case must then proceed." That is clearly the right course to be pursued here, the appellant being remanded in custody.

A further point is that the prisoner desired five cases of false pretences to be taken into consideration and the Court refused on the ground that they were not of a similar character to housebreaking, and that there is undoubtedly authority for that view is true: *McLean*, 1911, 1 K. B. 332; 80 L. J. K. B. 309; 103

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12 *November.*

EDWARD LLOYD.

Howart L.C.J.

L. T. R. 911; 75 J. P. 127; 27 T. L. R. 138; 22 Cox, C. C. 362; 6 Cr. App. R. 26. It was, however, there laid down, "Where there is a different charge in a different county, the judge should not take the other charge into consideration unless the prosecution consents and the public interest does not require that there should be a separate investigation."

Counsel has asked this Court to make an order that the Court of Quarter Sessions shall take into consideration those five cases. A judge may, in passing sentence, take into consideration other charges which a prisoner admits. It would be a serious innovation to extend this principle and to make it compulsory upon the judge so to do. *S. Smith,* 85 J. P. 224; 15 Cr. App. R. 172: 1921. This Court makes no order that the Court of Quarter Sessions shall take these five cases into consideration, but after the necessary conditions have been fulfilled that court may, if it thinks fit, do so. I should like to refer to a statement made by counsel for the appellant, and also by the appellant himself in his application, namely, that if these offences are not taken into consideration, the appellant is liable to be re-arrested on his release from prison and tried and sentenced for them. It has been laid down again and again by this Court that such a procedure is not merely undesirable but most unfair. If it is intended to proceed with those charges it must be done at once. An order will be made that appellant be remanded in custody and the case go back for trial, and that the prisoner be asked to plead again to the indictment.

There is one other point. The prisoner has been kept in detention, and if he is convicted or pleads guilty, the time which has been consumed by this error ought to be put to the prisoner's credit.

Conviction quashed.

Venire de novo *awarded.*

J. N. F.

FELIX CAMPBELL. 1923
GEORGE SKOYLES. 12 *November.*

Sentences reduced in view of youth and previous good character.

Appeal against sentences.

Appellants, who were not present, were convicted at the Wiltshire Assizes on 18th October, 1923, before Avory J., of sodomy and gross indecency, and were each sentenced to five years' penal servitude and six months' imprisonment with hard labour, the sentences to run concurrently.

No counsel appeared.

The Lord Chief Justice: It is not necessary to enter into the facts, but both appellants were privates in a certain corps, and nothing was recorded against them of a similar nature before. One is aged twenty-two years, and the other nineteen years, and both were drunk when the offences were committed. The Court thinks it right to substitute for the sentences of penal servitude a sentence of twelve months' imprisonment with hard labour in the case of the elder appellant, and a sentence of nine months' imprisonment with hard labour in the case of the younger. The concurrent sentences of six months' imprisonment with hard labour will stand.

Sentences reduced.

J. N. F.

JACOB MARCUS. 19 *November.*

An applicant for leave to call further evidence should be prepared with proofs of the evidence of the proposed witnesses.

Application for leave to appeal against conviction and sentence.

Applicant was convicted at the Central Criminal Court on 24th October, 1923, before the Common Serjeant, of receiving, and was sentenced to nine months' imprisonment with hard labour.

F. G. Paterson for the applicant, who was not present.

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19 *November.*

JACOB MARCUS.

Hewart L.C.J.

The LORD CHIEF JUSTICE: In our view this is a case where leave to appeal should be granted. We notice there is an application to call further evidence. Have you a proof of the evidence the witnesses will give, or whether it will throw light on the matter?

Paterson. No. Only the statement made by appellant since the trial.

The LORD CHIEF JUSTICE: It would be well if the gentleman instructing you obtained proofs before the next hearing.

Application granted.

J. N. F.

See p. 191.

Solicitor for Appellant—*P. S. Costerton.*

BARBARA PANSY HUGHES.

Severity of sentence in case of female just above the age-limit for Borstal treatment.

Appeal against sentence.

Appellant, who was present, was convicted at the Blackpool Borough Petty Sessions on 11th August, 1923, of larceny, and committed for sentence to the Lancashire (Preston) Sessions, where on 18th October, 1923, she was sentenced by the Chairman to three years' detention in a Borstal institution.

The LORD CHIEF JUSTICE: This appellant alleges that she was over twenty-one years of age at the time of committing the offence, and it appears to be reasonably clear that she is right. It is not suggested, except so far as her age is concerned, that she is not a fit subject for Borstal treatment, but in the circumstances the sentence cannot be performed.

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19 *November.*

BARBARA PANSY HUGHES.

Hewart L.C.J.

The question arises about the proper course to be taken with the appellant, and we have come to the conclusion that, she having been detained for three months, we will give her an opportunity of leading an honest life and let her now go free.

Sentence quashed.

J. N. F.

GILBERT RAMSEY ALIAS GILBERT ROBERTS.

Conviction quashed in view of misdirection.

Appeal against conviction and sentence.

Appellant was convicted at the Glamorganshire (Swansea) Sessions on 16th October, 1923, before the Chairman, of shop and garage breaking, and stealing therefrom, and also of receiving, and was sentenced to two years' detention in a Borstal institution.

Bertram Long for the appellant (under s. 10 of the Criminal Appeal Act), who was present.

There was no evidence of the breaking and entering and stealing, and the summing up was defective as regards those charges and also the charge of receiving. *J. Bailey*, 13 Cr. App. R. 27: 1917, c. q.

J. W. Morris for the Crown.

The LORD CHIEF JUSTICE: It is unnecessary to recapitulate the facts in this case. It is enough to say that the shop was broken into as long ago as 2nd January last, and that the garage was broken into on the same day, and that it was not until the 13th August, after some migrations on the part of appellant, his mother and step-father, that the step-father went to the police and said that the appellant was in possession of stolen property.

There was a conflict of evidence between the step-father and the appellant, and there was one independent witness whose evidence, if properly analysed, might have affected the verdict

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19 *November.*

GILBERT RAMSEY ALIAS GILBERT ROBERTS.

Hewart L.C.J.

of the jury. The evidence was most unsatisfactory and the jury needed to have a very careful direction from the Court to assist them in coming to a conclusion; there was not only the unsatisfactory evidence, but also the lapse of time, too, between the 2nd January and the 13th August should have been considered, and such assistance was not given in this case.

The Court thinks that the appeal should be allowed and that the conviction should be quashed.

Conviction quashed.

J. N. F.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE SWIFT.

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3 *December.*

ANDREW BAKER.

A summing up on an indictment for obtaining by false pretences must contain an express direction on intent to defraud: if it does not, the Court will quash a conviction.

Appellant was convicted at the West Sussex Sessions, on 18th October, 1923, before the Deputy-Chairman, of obtaining by false pretences, and was sentenced to eighteen months' imprisonment with hard labour.

On November 19th the full Court gave leave to appeal against conviction and sentence and assigned counsel.

A. Highmore King for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. The defence was not properly put to the jury. The defence that there was no intent to defraud was not put to them, and the intent to defraud is the most necessary element in such a case. (He was stopped by the Court.)

R. Blaker for the Crown. Taking into consideration the evidence before the jury, and particularly the evidence of appellant himself, there was abundant material on which the jury could come to the conclusion that there was an intent to defraud.

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3 *December*.

ANDREW BAKER.

Hewart L.C.J.

The LORD CHIEF JUSTICE: In this case the appellant was convicted on one count of an indictment for obtaining a motor car by false pretences, and on another count for obtaining the implements and stock of a baker's business and £16 by false pretences. He said that he had a good claim against the Treasury and that he did these acts to bring this claim into notice and not with any intent to defraud.

There is one point that stands out. Inadvertently the Deputy-Chairman omitted to explain to the jury that in a charge of obtaining by false pretences an essential ingredient of the offence is that that which was done was done with intent to defraud. It is always necessary that this fundamental point should be made plain to the jury, and especially so when the accused says not that he did not do the acts, but that he did them but with no intent to defraud. In the summing-up there was no reference, except in one small remark, to this point; there was no express reference to it.

In the circumstances this Court cannot say that the jury must inevitably have convicted had there been a proper direction, and the conviction must be quashed.

Conviction quashed.

J. N. F.

JACOB MARCUS.

In the doctrine of "recent possession" of stolen property "recent" relates to the date of the larceny.

See p. 187, above.

E. J. Purchase, K.C. (*C. W. Measor* with him), for the appellant, who was present. My submission is on the question of "recent possession." Recent possession must be possession recent to the larceny.

[SANKEY J.: Here there was a period of eight months between the larceny and possession.]

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JACOB MARCUS.

Hewart L.C.J.
Sankey J.
Swift J.

The learned Common Serjeant said that if a possessor of stolen goods when called upon gave an untrue account of them it was open to the jury to consider whether they were in his possession earlier. (He was stopped by the Court.)

The facts appear sufficiently from the judgment.

St. John Hutchinson for the Crown. This is an important case; if a decision were given that after six months had elapsed no explanation need be given, then a receiver could after that period expose stolen goods for sale with impunity. If the only evidence against the receiver is "recent possession," then it must in fact be recent to the larceny, but if there is other evidence then the length of time between the theft and the possession would not rule out consideration of all the evidence by the jury.

Harris, 8 Cox, C. C. 333: 1860; *Cooper,* 3 C. & K. 318: 1852.

In the latter case Maule J. said: "Where a man is found in possession of a horse six or seven months after it is lost, and there is no other evidence against him but that possession, he ought not to be called to account for it," and I submit that if there is other evidence then the converse applies.

The LORD CHIEF JUSTICE: In this case the appellant was convicted of receiving a quantity of silk knowing it to be stolen, and he now, by leave of the Court, appeals against that conviction. There are three material dates in the case.

In November, 1922, a certain quantity of silk was sent from Macclesfield. The truck in which it was sent arrived at Camden Town station, where the silk was stolen.

In July, 1923, the goods were seen and to be seen upon the premises of the appellant; part upon his counter visible to all.

In October, 1923, nearly a year after the theft, there were dealings with the goods on behalf of the appellant.

No real question of law arises. The point is sufficiently stated in Russell on Crimes, 8th ed. 1923, at p. 1239, viz.: "It has been held that the possession of stolen property sixteen months or six months or three months after it was lost is not such a recent possession as to put the prisoner upon showing how he came by it, unless there be evidence of something more than the

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3 *December.*

JACOB MARCUS.

Hewart L.C.J.

mere fact of possession at such a distance of time after the larceny." In the present case a period of eight months elapsed between the loss of the goods and the goods being first seen in the possession of the appellant. In these circumstances, if the doctrine of "recent possession" were to apply, it must be on account of other evidence.

The case against the appellant really depended on the evidence of a man named H., who had himself been convicted—though this was not known at the trial. It was a case of oath against oath, and even then it was only if a particular view of H.'s evidence were taken that the doctrine of "recent possession" could be held to apply.

Conviction quashed.

J. N. F.

JAMES THOMAS HALES.

26 *November.*

The judge who tries a prisoner in one county has no jurisdiction to sentence him in another.

A sentence for felony cannot be passed in the prisoner's absence.

An undefended prisoner who, in his defence, reads a document which is not admissible in evidence, does not thereby give the prosecution "the right of reply."

When the Court below has no jurisdiction, s. 4 (3) *of the Criminal Appeal Act does not apply.*

Application for leave to appeal against conviction and sentence and to call further evidence.

Applicant (who was not present) was convicted at the Oxford Assizes on 19th October, 1923, before Shearman J., of larceny, and was sentenced on 25th October at Worcester, in his absence, to fifteen months' imprisonment, to run concurrently with a sentence passed on 4th September, 1923.

SANKEY J.: In this case the Court gives leave to appeal, as we think that there are certain points to be enquired into, and we shall assign counsel.

Application granted.

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3 *December.*

JAMES THOMAS HALES.

Hewart L.C.J.
Sankey J.
Swift J.

H. H. Maddocks for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was not present. The learned judge had no jurisdiction to sentence appellant in his absence, he having been convicted of felony.

[The LORD CHIEF JUSTICE: You do not require anything more if that contention is sufficient.]

A. Ralph Thomas for the Crown. I have only been able to find two old cases on this subject, both in Lord Raymond's reports, but in the case of *Berry*, 104 L. T. J. 110, 1897, where the prisoner feigned madness, he was tried in his absence and convicted and sentenced to ten years' penal servitude. I submit that a man may be sentenced in his absence for a misdemeanour, and the distinction between being convicted of felony and being convicted of larceny is now only technical and not as valid as of old.

The fact that the prisoner is not present is not, I submit, an absolute bar to the judge's passing sentence.

[The LORD CHIEF JUSTICE: What is the difference between the passing of sentence and the rest of the trial?]

He has to be present during the trial to put his defence. He had an opportunity at Oxford of saying whether he had any objection to the passing of sentence upon him.

[The LORD CHIEF JUSTICE: Did anyone take the point on the jurisdiction at Worcester?]

No. Prisoner was not defended by counsel, and no one appeared for the Crown.

[SWIFT J.: Can you try a man in Worcestershire for a larceny in Oxfordshire?]

No, because there is the question of *venue*, and he has to be tried by a jury from Oxfordshire.

[SANKEY J.: Do you say that the passing of sentence is not part of the trial?]

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3 *December.*

JAMES THOMAS HALES.

Hewart L.C.J.
Sankey J.
Swift J.

The trial is over when the verdict is given, and the passing of judgment is not part of the trial.

[The LORD CHIEF JUSTICE: Have you any authority for that proposition? Have you any other authority to show that a man may be sentenced for felony in his absence?]

No. There are two cases, *Bithell*, 1 Lord Raymond, 47: 1695, and *Harris and Duke*, 1 Lord Raymond, 267: 1697, on the subject, but these cases do not very definitely deal with the matter. If the sentence is not valid I submit that no sentence has been passed, and this Court can pass such sentence as it may think fit.

[SWIFT J.: I observe also that the jury did not find appellant guilty of stealing, but of being a party to the stealing. Speeches by counsel being regulated by statute, what right had counsel for the prosecution to make a second speech when appellant called no witnesses, and was unrepresented by counsel?]

The appellant read a certificate from a doctor.

[SWIFT J.: What is the number of that exhibit?]

It was not put in as an exhibit. Appellant was told that it was not evidence, but was allowed to read it to the jury.

If the Court thinks the sentence must be quashed, I submit that it can deal with it under s. 4, sub-s. 3 of the Criminal Appeal Act, 1907, and pass such sentence as the Court thinks fit.

[The LORD CHIEF JUSTICE: That section has no application where something has been done without jurisdiction.]

A man may be convicted and not sentenced, and then sentenced later by the judge going the same circuit. *Pepper and Platt*, 1921, 3 K. B. 167; 90 L. J. K. B. 1152; 85 J. P. 264; 65 S. J. 715; 37 T. L. R. 863; 16 Cr. App. R. 12.

[The LORD CHIEF JUSTICE: That deals with a sentence passed where there was jurisdiction.]

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3 *December.*

JAMES THOMAS HALES.

Hewart L.C.J.

The LORD CHIEF JUSTICE: In this case the appellant was convicted of stealing a motor-cycle and side-car. The first part of the trial took place at Oxford on 19th October. At that time the appellant had an application pending before this Court, and because of that fact and in the interests of the appellant, the learned judge postponed sentence, and later sentence was passed at Worcester during the same circuit in the absence of the prisoner. In the opinion of the Court that cannot be done. It was a case of felony, and a sentence for felony cannot be passed in the prisoner's absence. There was another slip. The law is clear that if an undefended prisoner calls witnesses other than himself, or puts a document in evidence, counsel for the prosecution has the right to reply; otherwise he has not. In this case appellant was undefended and called no witnesses—it is true that he referred to a document, but it was one not admissible in evidence—yet counsel for the prosecution addressed the Court a second time. In these circumstances the conviction cannot stand and must be quashed.

Conviction quashed.

J. N. F.

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10 *December.*

WILLIAM GOSS.

Photographs of persons about to be put up for identification ought not to be shown previously to those who are invited to identify such persons.

Appeal against conviction and sentence by leave of the Court on November 19th. Applicant in person.

Appellant was convicted at the Cheshire (Knutsford) Sessions on 15th October, 1923, before the Chairman, of housebreaking, and was sentenced to three years' penal servitude.

The facts appear from the judgment.

E. H. Goodman Roberts for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present.

Trevor Lloyd for the Crown.

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10 *December.*

WILLIAM GOSS.

Hewart L.C.J.

The LORD CHIEF JUSTICE: This appellant was convicted of housebreaking and larceny, and was sentenced to three years' penal servitude. He now appeals by leave of the Court against his conviction and sentence. During the afternoon of 4th August last a house in Hyde was broken into. At about 4.20 p.m. on that afternoon, there being a considerable time during which the housebreaking might have taken place, a Mrs. Atkinson and her daughter saw a man in a navy blue suit carrying a bag and accompanied by a woman hurrying from the direction of the house, and going in the direction of the railway station. Mrs. Atkinson and her daughter saw the man for a few yards, and on 6th August, hearing of the crime, informed the police. On 10th August each of them was separately shown a number of photographs by an officer, and each picked out the same photograph, that of the appellant, as resembling the man she saw. At the time when each of them was shown the photographs nobody else was present in the room except the sergeant who was showing the photographs. Having seen the photographs, the following day they picked out the appellant from a number of other men.

There was other evidence, circumstantial evidence of a kind, relied on by the prosecution, but it is frankly conceded that, apart from the evidence of identification, there was no case for the prosecution.

No doubt there are circumstances in which the police of necessity make use of photographs, but to make use of photographs beforehand to see whether important witnesses can identify an accused person whom they are afterwards going to see is to pursue a course which is not a proper one.

Indeed it is impossible to see what legitimate purpose such preliminary examination could fulfil or be expected to fulfil. It is not sufficient that what is done should be fair; it must be manifestly clear that nothing was done which might seem to be unfair. As a result of what was done here, a suspicion, however unfounded, may easily arise. There are other unsatisfactory points, and apart altogether from the matter referred to, there was strong evidence of an *alibi*. The conviction must be quashed.

Conviction quashed.

J. N. F.

1923
10 *December.*

CHARLES LESLIE NORMAN.

Appeal against conviction as a habitual criminal and sentence.

Appellant pleaded guilty at the Central Criminal Court on November 14th, 1923, before the Commissioner, to charges of burglary and uttering a forged document, and was found guilty of being a habitual criminal, and was thereupon sentenced to three years' penal servitude and five years' preventive detention.

Appellant in person.

Horace Fenton for the Crown.

The Lord Chief Justice: This appellant pleaded guilty to certain counts in an indictment charging him with burglary, larceny and uttering a forged cheque, and was also convicted of being a habitual criminal.

His notice of appeal and the documents accompanying it appear to raise a point of considerable importance.

By the Prevention of Crime Act, 1908 (8 Edw. 7, c. 59), s. 10, sub-s. 2, it is enacted that "a person shall not be found to be a habitual criminal unless the jury finds on evidence—

"(a) that since attaining the age of sixteen years he has at least three times previously to the conviction of the crime charged in the said indictment been convicted of a crime, whether any such previous conviction was before or after the passing of this Act, and that he is leading persistently a dishonest or criminal life; or

"(b) that he has on such a previous conviction been found to be a habitual criminal and sentenced to preventive detention."

It is urged on behalf of the appellant that, although it is open to the jury to find that he is a habitual criminal upon proof of a previous conviction as a habitual criminal, the statute does not say that upon such proof being given the jury *must* so find him.

It is not necessary to say more now in view of previous observations which have been made in this Court.

The case will be adjourned to the 21st December to be heard before a full Court.

1923
Dec. 21.

The appeal was heard before the Lord Chief Justice, and Avory, Lush, Sankey and Swift JJ.

Roland Oliver (under s. 10 of the Criminal Appeal Act, 1907) for the appellant. *Travers Humphreys* (with him *H. Fenton*) for the Crown.

C. a. v.

J. N. F.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE LUSH AND MR. JUSTICE SANKEY.

---

17 *December*

WILLIAM LANGLEY.
FRANK FLITTERMAN.
WILLIAM JAMES DE CORT.

A certificate of appeal should only be granted when the learned judge has a doubt about some point in the case.

Appeal against conviction upon certificate in the cases of Langley and Flitterman, and application for leave to appeal against conviction and sentence in the case of de Cort.

Appellants were convicted at the Central Criminal Court on 20th November, 1923, before the Recorder, of larceny, and sentenced, Langley to eight months' imprisonment, Flitterman to nine months' imprisonment, and de Cort to twenty months' imprisonment, all with hard labour.

The applicant de Cort in person.

E. Abinger for the appellants Langley and Flitterman.

There is only one point; that is, aye or no, was there any evidence of larceny against appellants? On 23rd September, 1923, a Sunbeam car was stolen, and it was proved by the prosecution that de Cort garaged it on the following day. On 3rd October the other two appellants went to Shoeburyness in the car with de Cort and stayed at the same hotel. The learned Recorder, on

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Hewart L.C.J.
Lush J.
Sankey J.

the authority of *Makin* v. *Att.-Gen. for New South Wales*, 1894, A. C. 57; 63 L. J. P. C. 41; 58 J. P. 148; 69 L. T. R. 778; 17 Cox, C. C. 704; *G. J. Smith*, 84 L. J. K. B. 2153; 25 Cox, C. C. 271; 11 Cr. App. R. 229: 1915; *Bond*, 1906, 2 K. B. 389; 75 L. J. K. B. 693; 54 W. R. 586; 95 L. T. R. 296; 70 J. P. 424; 21 Cox, C. C. 252, allowed evidence to be given that Langley and Flitterman were seen driving with de Cort in another car previously stolen. Those cases were all cases where evidence of other offences was allowed to negative accident, and such evidence cannot be given in a case of stealing.

At the end of the case for the prosecution I submitted that there was no evidence of larceny or receiving to go to the jury, but the learned Recorder held that there was evidence of larceny. The fact of being in the car on 3rd October cannot be evidence of the asportation of the car on 23rd September. The asportation must accompany the actual taking or be near to it.

Eustace Fulton for the Crown was not called upon.

The LORD CHIEF JUSTICE: These three appellants were indicted upon charges of stealing and receiving a motor car. De Cort pleaded guilty, and the other two appellants were acquitted of receiving but convicted of the larceny, and they now appeal upon a certificate granted by the learned Recorder under s. 3 (b) of the Criminal Appeal Act, 1907, 7 Edw. 7, c. 23. De Cort at the trial at first pleaded not guilty, but subsequently withdrew that plea and pleaded guilty without reservation. He now alleges that he took that course under a misapprehension upon the advice of his counsel. It is clear that there was abundant evidence against him, and that there is nothing to support the contention he now puts forward. In the case of Langley and Flitterman the ground on which the certificate was granted at the request of counsel is stated to be whether there was any evidence proper to be left to the jury of the alleged larceny.

It is clear that the learned Recorder was not of opinion that it was a case for a certificate, and he said that he only granted it because counsel asked for it.

In view of his opinion and his ruling that there was evidence of larceny, which ruling this Court thinks was quite correct, it is a little puzzling to know why the certificate was granted. It

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is a departure from the ordinary practice, and if continued would result in a great increase of such cases, and considerable expense would be incurred, as in such cases the prosecution must be represented here, which would mean a great waste of public money.

There is no point here. It is clear these men were in possession of the car, and it is surprising that the learned Recorder held that there was no evidence of receiving and that he granted the certificate. There is nothing in the case, and the appeals and the application are dismissed.

Appeals dismissed.

Application dismissed.

J. N. F.

Solicitor for the Appellants Langley and Flitterman—*W. Goodwin.*

JAMES DANIEL JONES.

On the trial of sexual offences what is the earliest reasonable opportunity of complaint depends on the circumstances of each case.

Application for leave to appeal against conviction and sentence.

Applicant, who was not present, was convicted at the County of London Sessions on 22nd November, 1923, before the Deputy-Chairman, of indecent assault on his daughter, and sentenced to eighteen months' imprisonment.

Application granted.

BEFORE

THE LORD CHIEF JUSTICE, MR. JUSTICE SANKEY AND MR. JUSTICE SWIFT.

JAMES DANIEL JONES.

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C. K. Tatham for the appellant (under s. 10 of the Criminal Appeal Act, 1907), who was present. I submit that in this case the learned Deputy-Chairman did not put the prisoner's defence

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to the jury, and also misdirected them. The case for the prosecution depended solely on the evidence of the prosecutrix, and though the appellant was asked whether he wanted to ask any questions, I do not think that he was given to understand that he could cross-examine her, and he merely denied her statements.

[SWIFT J.: Have you anything to say about the particulars of a complaint by the woman being given?]

I submit that that evidence should not have been given. The alleged offence took place in the early morning, and though her mother was in the house, there was no evidence that she made any complaint until her husband returned in the evening.

He was stopped by the Court.

G. F. L. Bridgman, for the Crown, submitted that the law demanded that complaint should be made to the most natural person at the earliest possible time. In view of the fact that appellant was her father, it was natural for her not to go to her mother, but to await for her husband's return.

The LORD CHIEF JUSTICE: It is not necessary to repeat the facts in this case. It is enough to say that at the trial the appellant was not represented by counsel; that if there was not a complete lack of corroboration of the main story on which the prosecution rested, there was but the faintest corroboration; that it is at least doubtful whether the statement of complaint given was admissible as evidence; that the summing-up was by no means adequate in certain particulars.

The trial was unsatisfactory, and the conviction must be quashed.

Conviction quashed.

J. N. F.

Solicitors for the Respondent—*Wontner & Sons.*

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